(10)

No. 96-292-CSX Title: Marian Johnson, et al., Petitioners
v.
Kristine L. Fankell

Docketed: August 22, 1996 Court: Supreme Court of Idaho

Entry	Date	Proceedings and Orders
	Aug 20 1996	Petition for writ of certiorari filed. (Response due September 21, 1996)
	Sep 23 1996	Brief amici curiae of Kentucky, et al. filed.
	Sep 23 1996	Brief of respondent Kristine L. Fankell in opposition filed.
	Sep 27 1996	Reply brief of petitioners Marian Johnson, et al. filed.
	Oct 2 1996	DISTRIBUTED. October 18, 1996
	Oct 21 1996	Petition GRANTED. SET FOR ARGUMENT February 26, 1997. **********
	Dec 5 1996	Joint appendix filed.
	Dec 5 1996	Brief of petitioners Marian Johnson, et al. filed.
	Dec 5 1996	Brief amici curiae of Kentucky, et al. filed.
	Jan 6 1997	Brief of respondent Kristine L. Fankell filed.
	Jan 17 1997	CIRCULATED.
	Jan 27 1997	Record filed.
	Feb 4 1997	Reply brief of petitioners Marian Johnson, et al. filed.
	Feb 5 1997	Record filed.
	Feb 26 1997	ARGUED.

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In The

Supreme Court of the United States

October Term, 1995

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR A WRIT OF CERTIORARI

or, in the Alternative,

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners.

PETITION FOR A WRIT OF MANDAMUS TO THE CLERK OF THE SUPREME COURT OF THE STATE OF IDAHO, FREDERICK C. LYON

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QUESTION PRESENTED FOR REVIEW

1. When a state trial court denies defendants' motion to dismiss or motion for summary judgment on a claim of qualified immunity under 42 U.S.C. § 1983, do defendants have a federal right to immediate appellate review of the claim of qualified immunity before discovery and trial?

PARTIES TO THE PROCEEDING

The Idaho State Liquor Dispensary was an additional party to the proceeding before the state trial court, but was not a party to the dismissed appeal before the Supreme Court of Idaho. The remaining parties to the proceeding are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI AND/OR FOR WRIT OF MANDAMUS

State actor-Petitioners Marian Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers respectfully pray that a writ of certiorari and/or a writ of mandamus issue to review the orders of the Clerk of the Supreme Court of the State of Idaho in *Fankell v. Johnson*, Idaho Appeal No. 22880, dismissing Petitioners' appeal from a trial court denial of a motion to dismiss, which was treated by the trial court as a motion for summary judgment, on the ground of qualified immunity under 42 U.S.C. § 1983.

OPINIONS BELOW

The April 23, 1996, order of the Clerk of the Idaho Supreme Court dismissing the appeal, and the May 23, 1996, Order of Clerk of the Idaho Supreme Court denying the petition for rehearing are not reported. The orders are reproduced in the Appendix to this petition.

JURISDICTION

The order of the Supreme Court of Idaho dismissing State actor-Petitioners' appeal was filed April 23, 1996. The petition for rehearing was denied May 23, 1996. This petition is filed within 90 days of the denial of rehearing.

Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1257 on their claim of a denial of an "immunity . . . claimed under

the . . . statutes of . . . the United States" and the mandamaus authority conferred on this Court (and all other federal courts) by 28 U.S.C. § 1651(a) to issue "all writs necessary or appropriate in aid of their respective jurisdictions" to aid the Court's certiorari jurisdiction.

STATUTORY AND RULE PROVISIONS

42 U.S.C. § 1983 provides:

> **§ 1983. Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Idaho Appellate Rule 11(a) provides:

> **Rule 11. Appealable judgments and orders**
>
> An appeal as a matter of right may be taken to the Supreme Court [of Idaho] from the following judgments and orders:
>
> (a) Civil Actions. From the following judgments and orders of a district court in a civil action:

> (1) *Judgments, orders and decrees which are final*, including orders of the district court granting or denying peremptory writs of mandate and prohibition.
>
> (2) Decisions by the district court dismissing, affirming, reversing or remanding an appeal.
>
> (3) Judgments made pursuant to a partial judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.
>
> (4) Any contempt order or judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.
>
> (5) An order granting or refusing a new trial, including such orders which contain a conditional grant or denial of a new trial subject to additur and remittitur.
>
> (6) An order granting or denying a motion for judgment notwithstanding the verdict.
>
> (7) Any order made after final judgment including an order denying a motion to set aside a default judgment, but excluding an order granting a motion to set aside a default judgment.

Emphasis added.

STATEMENT OF THE CASE

Procedural and Factual Background

Respondent Kristine Fankell is a former employee of the Idaho State Liquor Dispensary (the Dispensary), an agency of the State of Idaho. Petitioners Marian Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers are officers or employees of the Dispensary, *i.e.*, they are state actors for purposes of 42 U.S.C. § 1983. On April 19, 1995, Respondent sued State actor-Petitioners and the Dispensary in Idaho state district court under 42 U.S.C. § 1983 and § 1988. Her First Amended Complaint filed thereafter plead two causes of action under § 1983, both of which arose out of termination of her employment by the Dispensary on April 22, 1993. She sought monetary damages, including punitive damages.

State actor-Petitioners answered, pleading qualified immunity as an affirmative defense. They moved to dismiss on grounds including qualified immunity. The trial court, treating the motion to dismiss as a motion for summary judgment, denied the motion from the bench. On February 23, 1996, the court filed a written order summarily denying the motion without explanation.

State actor-Petitioners filed a timely notice of appeal to the Supreme Court of Idaho, stating in their notice of appeal that they were appealing "from that portion of the Order . . . rejecting [Petitioners'] defense of qualified immunity under 42 U.S.C. § 1983." App. 6a. The Clerk of the Idaho Supreme Court *sua sponte* issued a cursory order dismissing the appeal "for the reason that it is not from a final order or judgment" under Idaho Appellate Rule 11. App. 1a-2a. State actor-Petitioners petitioned for

rehearing and provided a memorandum briefing the issue of the finality of and the immediate appealability of trial court denials of motions that raise a defense of qualified immunity under 42 U.S.C. § 1983. App. 8a-22a. The Clerk of the Idaho Supreme Court denied the petition for rehearing. App. 3a-4a. State actor-Petitioners now bring this petition for a writ of certiorari and/or for mandamus.

SUMMARY OF ARGUMENT

The state courts are split on the issue of whether § 1983 defendants have a right to appeal denial of their qualified immunity motions without proceeding to discovery or trial before appellate review. The majority of states that have reached the issue allow such appeals, but Idaho has joined the ranks of states that do not. A number of state supreme courts have held that qualified immunity is a substantial federal right that cannot be extinguished by a state procedural rule denying an immediate appeal following a trial court's rejection of the defense. The opposite line of cases holds that state procedures cannot be altered or are not preempted by this Court's qualified immunity precedents. Resolution of this conflict in state application of federal law is worthy of this Court's review.

In addition, there is a split between § 1983 defendants' federal appellate rights and state appellate rights in states like Idaho. Federal courts of appeal are required to take appeals from denials of defendants' qualified immunity motions, but Idaho and several other states deny such appeals. This means there are different rules of

decision for protection of defendants' qualified immunity rights not to be subjected to discovery and trial for defendants sued in federal district court and for defendants sued in state court in states in which these appeals are not allowed. This is directly contrary to this Court's precedent that state law cannot be applied to defeat federal rights in § 1983 actions.

There are significant numbers of § 1983 defendants in state courts who are and will continue to be affected by this disparate treatment among the state courts and between federal courts and some state courts. This is an appropriate case for the Court to issue a writ of certiorari to resolve this split of authority among the state courts and disparity of treatment between defendants in federal and state courts for state courts that do not recognize the right of immediate appeal of denial of qualified immunity motions under § 1983. Lastly, the Court should issue a writ of mandamus to the Clerk of the Supreme Court of Idaho if necessary to preserve a case or controversy for its decision and if necessary to provide relief to State actor-Petitioners.

REASONS FOR GRANTING THE PETITION

1. State Appellate Court Decisions Directly Conflict Regarding Whether § 1983 Defendants Have a Right to Immediate Appeal of Denial of Their Qualified Immunity Motions

As with federal actors sued in their personal capacities directly under the Constitution, qualified immunity is

often the most important defense available to state actors sued in their personal capacities under § 1983. Qualified immunity is an important substantive right because it not only shields defendants from liability, it also shields them from burdens of litigation (*e.g.*, discovery) and from trial itself. The law of qualified immunity has developed both in suits brought against federal officers and employees under the Constitution itself and in suits brought against state officers and employees under § 1983, and the Court has said "that it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.' *Butz v. Economou*, [438 U.S. 478, 504, 98 S. Ct. 2894, 2909, 57 L. Ed. 2d 895 (1978)]." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, n.30, 102 S. Ct. 2727, 2738, n.30, 73 L. Ed. 2d 396 (1982). Accordingly, this petition cites the immunity law of § 1983 interchangeably with the immunity law of suits against federal officers or employees brought directly under the Constitution.

The Court has held that a denial of a motion to dismiss and that a denial of a motion for summary judgment on the ground of qualified immunity is a "final decision" appealable under 28 U.S.C. § 1291 under the collateral order doctrine. A pre-trial denial of a qualified immunity motion is conclusive as to that right, and if defendants are forced to prepare for and stand trial based upon an erroneous denial of a qualified immunity defense that cannot be immediately appealed, they have irretrievably lost their qualified immunity protection. See, *e.g.*, *Behrens v. Pelletier*, ___ U.S. ___, ___, 116 S. Ct. 834, 838, 133 L. Ed. 2d 773 (1996); *Seigert v. Gilley*, 500 U.S. 226,

231-32, 111 S. Ct. 1789, 1793, 114 L. Ed. 2d 277 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 524-30, 105 S. Ct. 2806, 2814-17, 86 L. Ed. 2d 411 (1985); *see also, Johnson v. Jones*, 515 U.S. ___, ___, 115 S. Ct. 2151, 2158, 132 L. Ed. 2d 238 (1995).

Despite the Court's holdings under federal appellate statutes that a trial court's denial of a qualified immunity motion is a "final decision" that is immediately appealable or the immunity will be effectively lost, state appellate courts are divided on whether defendants are entitled to an immediate appeal of a denial of a qualified immunity motion when the § 1983 action is brought in state court. There are at least three groups of state appellate decisions addressing appealability in state courts of a denial of a qualified immunity motion under § 1983: the first guarantees immediate appellate review before there are further proceedings, the second leaves the possibility of immediate appellate review before further proceedings to the discretion of the reviewing appellate court, and the third denies appellate review before further proceedings altogether. Under these divided precedents, numerous state actors who each year are sued under 42 U.S.C. § 1983 in state courts risk losing the benefits of their most important federal defense – avoidance of discovery and trial – simply because of the forum in which the action was brought.

First, the appellate courts of at least three states – Colorado, Oklahoma and Maine – have held that they must accept these immediate appeals by virtue of the primacy of federal law, notwithstanding contrary state

law or rule of finality or appealability.[1] (At least ten more states – Arizona, Arkansas, Florida, Massachusetts, Minnesota, New Hampshire, New Mexico, North Carolina, Vermont, and Wyoming – accept § 1983 defendants' immediate appeal from denial of qualified immunity motions by the state's adoption as state law of the collateral order doctrine of federal law.[2]) These states'

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[1] *City of Lakewood v. Brace*, ___ Colo. ___, ___, ___ P.2d ___, ___, No. 955C196, 1996 WL 342293, at *5 (June 24, 1996), ("[T]he United States Constitution and federal laws passed pursuant to it are equally enforceable in federal and state courts under the Supremacy Clause. Moreover, '[t]he elements of, and the defenses to, a federal cause of action are defined by federal law,' " quoting *Howlett v. Rose*, 496 U.S. 356, 375 (1990), and taking appeal even though denial of summary judgment motion is not generally appealable under state appellate rules); *Lord v. Murphy*, 561 A.2d 1013, 1016 (Me. 1989) ("M.R. Civ. P. 54(b) is thus inapplicable here because the defendants are appealing a final decision, under the collateral order doctrine, of the court's denial of their absolute or qualified immunity defense," after citing *Mitchell*); *McLin v. Trimble*, 795 P.2d 1035, 1037 (Okla. 1990) (the "scope of qualified immunity in a state court proceeding" had to be "the same as that found in Federal Court" because qualified immunity defense was a substantial right of a § 1983 defendant that could not be extinguished by a state procedural rule, so contrary state procedural rule was invalidated under Supremacy Clause).

[2] *Henke v. Superior Court of the State of Arizona*, 161 Ariz. 96, 100, 775 P.2d 1160, 1164 (Ct. App. 1989) ("state procedural rules apply as long as they do not obliterate the federal right," so defendant in § 1983 action is not required to await final judgment before appealing trial court's denial of defense); *Virden v. Roper*, 302 Ark. 125, 128, 788 S.W.2d 470, 472 (1990) ("The appealability of a denial of summary judgment based on qualified immunity from suit is clearly established," citing *Mitchell*); *Tucker v. Resha*, 648 So. 2d 1187, 1190 (Fla. 1994) ("[f]or the reasons discussed above, we find the standard announced

appellate courts are available to give state actors the benefits of qualified immunity when a trial court has erroneously ruled against that defense.

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by the Supreme Court in *Mitchell* to be the proper one for reviewing such orders"); *Breault v. Chairman of the Board of Fire Comm. of Springfield*, 401 Mass. 26, 31, 513 N.E.2d 1277, 1280-81 (1987), *cert. denied sub nom. Forastiere v. Breault*, 485 U.S. 906, 108 S. Ct. 1078, 99 L. Ed. 2d 237 (1988) ("Therefore, in the sense contemplated by our rule of present execution, the judge's order denying qualified immunity is final, and the question of the validity of the judge's order is ripe for consideration by this court," (citation omitted)); *Anderson v. City of Hopkins*, 393 N.W.2d 363, 364 (Minn. 1986) ("We believe that the *Mitchell* case is a well-reasoned case that ought to be followed in analogous cases in interpreting Minn. R. Civ. App. P. 103.03, without regard to whether it must be followed."); *Richardson v. Chevrefils*, 131 N.H. 227, 231-32, 552 A.2d 89, 92 (1988) ("Although all of the court's rulings . . . would normally be treated as interlocutory, . . . [w]e have followed *Mitchell* in accepting the State defendants' appeal from the order denying their motion for summary judgment."); *Carillo v. Rostro*, 114 N.M. 607, 616-17, 845 P.2d 130, 139-40 (1992) ("writ of error [adapted] as the procedural device for invoking the collateral order doctrine" in order to review denial of defense of qualified immunity); *Corum v. University of North Carolina*, 330 N.C. 761, 767, 413 S.E.2d 276, 280, *cert. denied sub nom. Durham v. Corum*, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992) ("a denial of a summary judgment motion is normally not immediately appealable; however, under [*Mitchell*], when a motion for summary judgment based on immunity defenses to a section 1983 claim is denied, such an interlocutory order is immediately appealable before final judgment."); *Murray v. White*, 155 Vt. 621, 625, 587 A.2d 975, 977-78 (1991) ("In [*Mitchell*], the Supreme Court held that a trial court's denial of a claim of qualified immunity met these [collateral order] requirements, and we agree with this determination."); *Park County v. Cooney*, 845 P.2d 346, 349 (Wyo. 1992) ("State courts are divided on whether

Second, the appellate courts of at least three states – Alabama, Washington, and Wisconsin – have accepted § 1983 defendants' appeals from denials of qualified immunity motions, not because of mandate of or adoption of federal law, but because they have exercised discretionary appellate jurisdiction under state law to hear such appeals.[3] These decisions do not, of course,

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interlocutory appeal is available under these circumstances. We believe the state decisions which allow appeal, for the reasons detailed in *Mitchell* as cited above, are better reasoned; and we therefore hold that an order denying dismissal of a claim based on qualified immunity is an order appealable to this court," citing *Henke*); *Abell v. Dewey*, 870 P.2d 363, 367 (Wyo. 1994) ("Even when the case is tried in state court, the elements of, and defenses to, a federal cause of action for violation of 42 U.S.C. § 1983 are defined by federal law," citing *Mitchell* for appealability of denial of motion to dismiss on ground of qualified immunity).

[3] *Ex parte Franklin County Department of Human Resources*, 674 So. 2d 1277, 1280 (Ala. 1996) (court declined to adopt collateral order doctrine, but reviewed denial of defense of qualified immunity under writ of mandamus); *Walden v. City of Seattle*, 77 Wash. App. 784, 788, 892 P.2d 745, 747 (1995) ("While a few state courts have concluded that they must also provide an immediate appeal from interlocutory immunity decisions in § 1983 actions, most states have concluded that state rules of appellate procedure control over federal procedural law in such cases and/or that the availability of some form of discretionary or extraordinary interlocutory review is sufficient to satisfy any federal requirements and avoid violation of the supremacy clause," (footnote omitted)); *Baxter v. Wisconsin Dep't of Natural Resources*, 165 Wis. 2d 298, 302, n.3, 477 N.W.2d 648, 650, n.3 (Wis. App. 1991), *review denied* 485 N.W.2d 412 (1992) ("An order denying a motion to dismiss is not final[, h]owever, if the motion to dismiss is based on a claim to qualified immunity, an order denying the motion will usually satisfy the criteria for

guarantee that the next request for discretionary review will be granted; state actors sued in these states' courts must rely on the discretion of the appellate courts to obtain the benefits of qualified immunity when a trial court has erroneously denied a qualified immunity motion.

Third, the appellate courts of at least four states – Illinois, North Dakota, Ohio, and Texas – have previously refused to hear appeals from denial of qualified immunity motions. These decisions do not allow state procedure to take into account this Court's precedents regarding the immediate appealability of denials of qualified immunity.[4] Idaho has now joined the ranks of states

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granting a petition for leave to appeal," citing *Mitchell*). Justice Maddox of the Supreme Court of Alabama concluded that *Baxter* was an example of a state court adopting the collateral order doctrine. *Ex parte Franklin County, supra*, 674 So. 2d at 1284 (Ala. 1996) (Maddox, J., concurring and dissenting).

[4] *Pizzato's, Inc. v. City of Berwyn*, 168 Ill. App. 3d 796, 798, 523 N.E.2d 51, 53 (Ill. Ct. App. 1988), *appeal denied*, 122 Ill. 2d 593, 530 N.E.2d 263 (1988), *cert. denied sub nom. City of Berwyn v. Pizzato's Inc.*, 489 U.S. 1054, 109 S. Ct. 1315, 103 L. Ed. 2d 584 (1989) ("Regardless of how well reasoned the 'collateral order' doctrine may be, it cannot be used to confer jurisdiction upon this court where none exists under Illinois law."); *Klindtworth v. Burkett*, 477 N.W.2d 176, 183 (N.D. 1991) ("[W]e hold that a denial of a motion for summary judgment based on qualified immunity [under § 1983] and statutory immunity under [North Dakota statute] is not appealable."); *Ohio Civil Service Employees Association v. Moritz*, 39 Ohio App. 3d 132, 529 N.E.2d 1290, 1290 (Ct. App. 1987) (Syllabus 2 provides: "The denial of a motion for summary judgment in a case brought under Section 1983, Title 42, U.S. Code, which motion is based on a claim of qualified immunity by state officials, is not a final appealable order."); *Noyola v. Flores*, 740 S.W.2d 493, 493-94 (Tex. Ct. App. 1987)

denying immediate review. In each of these states defendants whose qualified immunity motions under § 1983 are incorrectly denied by the trial court always lose the benefit of their qualified immunity – freedom from preparation for trial and from trial itself – before attempting to rectify the error on appeal.

Thus, the state courts are divided over whether a state trial court's denial of a qualified immunity motion is immediately appealable, and their decisions are squarely in conflict. One line of cases holds that qualified immunity is a substantial federal right that cannot be defeated by a state procedure rejecting an immediate appeal from a pre-trial denial of the immunity defense; the opposite line holds that state procedures cannot be altered or preempted by this Court's qualified immunity precedents regarding the immediate appealability of denial of a qualified immunity motion. Resolution of this conflict concerning how to give effect to the key § 1983 defense of qualified immunity is worthy of the Court's review.

2. The Order Below Conflicts With This Court's Precedents That State Courts Cannot Apply State Law to Defeat Federal Rights Under § 1983

In *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), and *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990), this Court examined the

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(appeal of denial of motion for summary judgment on ground of qualified immunity dismissed because it was not allowed by Texas law).

circumstances under which state law defenses are pre-empted when a § 1983 claim is brought in state court. *Felder* involved a procedural notice-of-claim statute that Wisconsin applied to § 1983 actions. *Felder* held that the notice-of-claim statute was preempted because it was inconsistent with federal law and would produce different outcomes in § 1983 litigation based solely on whether the claim was asserted in state or federal court. "States may establish the rules of procedure governing litigation in their own courts[, but] where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.' " 487 U.S. at 138, 108 S. Ct. at 2306, quoting *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296, 70 S. Ct. 105, 106, 94 L. Ed. 100 (1949). The "Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' " 487 U.S. at 151, 108 S. Ct. at 2313-14, quoting *Garret v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S. Ct. 246, 251, 87 L. Ed. 239 (1942).

Howlett involved the Florida state courts' refusal to allow a § 1983 suit against a school board because school boards were immune from suit under state law by reason of sovereign immunity. This Court held that the Supremacy Clause prevented Florida from refusing to entertain a § 1983 claim against a school board, reiterating "States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." 496 U.S. at 372, 110 S. Ct at 2441. The Court would not allow Florida to discriminate against a federal claim by imposing defenses or immunities not recognized under federal law; indeed, such discrimination violated the

Supremacy Clause. *See also Burnett v. Grattan*, 468 U.S. 42, 104 S. Ct. 2924, 82 L. Ed. 2d 36 (1984), which disapproved the adoption of a state's truncated period of time within which to file a civil rights suit because such statutes inadequately accommodate the complexities of federal civil rights litigation.

This case presents the other side of the coin from *Felder* and *Howlett* – are state courts (unlike federal courts) allowed to deny § 1983 defendants the benefit of immediate appeal from denial of qualified immunity motions, thereby throwing the burden of discovery and trial upon those defendants, even when the denial of the qualified immunity motion was erroneous? *Felder* and *Howlett* were worthy of the exercise of this Court's certiorari jurisdiction to answer important questions of whether state law disadvantaging plaintiffs in state courts vis-à-vis plaintiffs in federal courts could, nevertheless, be applied in a § 1983 action; this case is worthy of this Court's certiorari jurisdiction to answer the important question of whether state law disadvantaging defendants in state courts vis-à-vis defendants in federal courts can, nevertheless, be applied.

3. Resolution of the Finality and Appealability of Denial of § 1983 Defendants' Qualified Immunity Motions in State Courts Is an Important Issue Affecting Numerous Defendants

There is a direct conflict in state court decisions regarding the finality and immediate appealability of state court denials of qualified immunity motions. The issue at stake is critically important to the numerous

§ 1983 defendants sued in state court each year. When *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), was decided, fewer than 300 cases were brought that year in federal court under all the civil rights acts. Twenty years later, in 1981 alone, nearly 32,000 suits were filed. P. Low and J. Jeffries, *Federal Courts and the Law of Federal-State Relations*, p. 854 (1987).

The numbers of § 1983 cases are burgeoning in state courts as well. "State courts as well as federal courts have jurisdiction over § 1983 cases." *Howlett*, 496 U.S. at 358, 110 S. Ct. at 2433. *Also*, *Maine v. Thiboutot*, 448 U.S. 1, 3, n.1, 100 S. Ct. 2502, 2503, n.1, 65 L. Ed. 2d 555 (1980). As this Court recognized in *Howlett*, 496 U.S. at 378, n.20, 110 S. Ct. at 1044, n.20: "Virtually every State has expressly or by implication opened its courts to § 1983 actions, and there are no state court systems that refuse to hear § 1983 cases." Oftentimes, when § 1983 defendants are sued in their personal capacities, qualified immunity is their key defense, for it will protect them from discovery and trial if they prevail. Yet, as the law now stands, whether § 1983 defendants must sacrifice the benefits of this immunity, should a trial judge erroneously rule against their motions asserting qualified immunity, depends not upon the merits of the defense itself, but, rather, upon the forum in which the defendants have been sued.

The extent to which the benefits of qualified immunity are protected from trial court errors currently comes down to the luck of the draw: Have the defendants been sued in federal or state court, and, if sued in state court, are they in a state system that finds *Mitchell* controlling or persuasive? The qualified immunity defense is far too important to the numerous state actors who rely on it for

protection against discovery and trial in groundless suits for it to be subjected to this form of legal randomness. The benefits of the immunity should not be lost simply because of the forum in which an action was brought.

It is clear that the qualified immunity defense is a substantial right. The immunity is so important that this Court has now held in *Behrens* that defendants claiming qualified immunity may twice immediately appeal if the qualified immunity defense was raised both by the motion to dismiss and motion for summary judgment. Yet, for defendants sued in state court, that immunity is completely sacrificed if a state appellate court refuses to accept an immediate appeal following an erroneous trial court determination. Because the immunity is an entitlement not to be subject to discovery and not to stand trial, that entitlement is irretrievably lost as soon as the case proceeds toward trial. Moreover, states denying an immediate appeal create a different outcome for the immunity protection based solely upon the forum of the suit, not only among the states, but between the state and federal district courts in the same jurisdiction. Denial of an immediate appeal following denial of a qualified immunity motion places § 1983 defendants sued in state court at a distinctly unfair disadvantage relative to § 1983 plaintiffs. Defendants lose the benefit of their most important federal defense merely because of the forum in which the action is entertained, while under *Felder* and *Howlett* all elements of a plaintiff's federal claim remain protected.

This situation not only creates an unlevel playing field, it also provides an incentive for removal of cases to federal courts: "More importantly, were we to withhold

the right of appeal in courts of this Commonwealth, the practical effect would be to ensure that a large number of suits under § 1983 would be removed to Federal courts." *Breualt*, 401 Mass. at 31, n.6, 513 N.E.2d at 1281, n.6.

The need for a uniform approach in both state and federal courts is important. Likewise, the conflict among the state courts needs to be resolved. State actor-Petitioners respectfully ask that this Court review this issue.

4. The Court Should Issue a Writ of Mandate to the Supreme Court of Idaho if Necessary to Preserve a Case or Controversy

Finally, the State actor-Petitioners are potentially on the horns of a dilemma. They have a real controversy with the decision of the Clerk of the Supreme Court of Idaho to dismiss their appeal, but they may not have a controversy on that issue with Respondent Fankell. The Clerk of the Supreme Court of Idaho dismissed State actor-Petitioners' appeal *sua sponte*, and Respondent Fankell has not yet taken a position on the issue of appealability of the denial of the qualified immunity motion presented by the State actor-Petitioners. Respondent Fankell should not be able to defeat this Court's jurisdiction by depriving the Court of a case or controversy by acquiescence in or agreement with State actor-Petitioners' position. This Court should issue a writ of mandamus to the Clerk of the Supreme Court of Idaho "in aid of its jurisdiction," 28 U.S.C. § 1651(a), if necessary to prevent loss of a case or controversy in order to

reach the important issue of state court appellate review of denial of qualified immunity motions under § 1983. *Cf. Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472, 82 S. Ct. 894, 897, 8 L. Ed. 2d 44 (1962) ("Our decision reversing that case . . . emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury"). Having unsuccessfully petitioned the Supreme Court of Idaho to reverse its Clerk's decision, there is no other court that can grant the relief sought: requiring the appellate courts of Idaho to accept State actor-Petitioners' appeal.

CONCLUSION

Qualified immunity is a critically important defense to thousands of § 1983 defendants who are sued each year in state court. The importance of the qualified immunity defense in conjunction with the current conflict among the state appellate courts regarding whether federal law entitles § 1983 defendants sued in state court to an immediate appeal from denial of qualified immunity motions merits review of this issue by this Court. Moreover, in *Behrens* the Court recently settled beyond any doubt federal court defendants' eligibility to obtain immediate, repeated appellate review of denial of their qualified immunity motions. State court defendants should not be forced to sacrifice the benefits of that immunity following an erroneous decision by a state trial court solely because of the forum in which the § 1983 action is brought. The Court has previously stated there is no difference between federal and § 1983 immunity

law. Following in the wake of *Behrens*, this is an appropriate time to settle state actors' rights to appeal from denial of their qualified immunity motions when they are sued in state court. Petitioners, therefore, respectfully pray that this Court issue a writ of certiorari to the Supreme Court of the State of Idaho, and, if necessary, also issue a writ of mandamus to the Clerk of the Supreme Court of Idaho.

Respectfully submitted,

ALAN G. LANCE
Attorney General of Idaho

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

KRISTINE L. FANKELL, Plaintiff-Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants-Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendant.	ORDER DISMISSING APPEAL NO. 22880 Ref. No. 96S-107

The NOTICE OF APPEAL is from an Order Denying a Motion for Summery [sic] Judgment, which is not appealable under I.A.R. 11; however, the Appellants state in the Notice of appeal that it is appealable under 42 U.S.C. § 1983 and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L. Ed 2d 773 (1996). The Court has reviewed the Notice of Appeal and statement of Appellants; therefore, after due consideration,

IT HEREBY IS ORDERED that the NOTICE OF APPEAL be, and hereby is, DISMISSED for the reason it is not from a final order or judgment.

DATED this 23rd day of April, 1996.

By Order of the Supreme Court

Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge James [R]. Michaud

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF IDAHO

KRISTINE L. FANKELL, Plaintiff-Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants-Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendant.	ORDER DENYING PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL NO. 22880 Ref. No. 96S-108

An ORDER DISMISSING APPEAL was issued April 23, 1996, for the reason the Notice of Appeal was not from a final order or judgment. A PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL AND MEMORANDUM SUPPORTING PETITION FOR REHEARING with attachments and AFFIDAVIT OF COUNSEL was filed by Appellants May 2, 1996. The Court is fully advised; therefore, after due consideration,

IT IS ORDERED that the PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL be, and hereby is, DENIED and this appeal is DISMISSED with the Remittitur to issue forthwith.

DATED this 23rd day of May, 1996.

Frederick C. Lyon, Clerk
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge James R. Michaud

APPENDIX C

ALAN G. LANCE
ATTORNEY GENERAL

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Attorneys for Defendants

**IN THE DISTRICT COURT OF
THE FIRST JUDICIAL DISTRICT
STATE OF IDAHO,
IN AND FOR THE COUNTY OF BONNER**

KRISTINE L. FANKELL, Plaintiff/Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants/Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendants.	Case No. CV-95-00529 **NOTICE OF APPEAL**

TO: THE ABOVE NAMED RESPONDENT, KRISTINE L. FANKELL, AND THE PARTY'S ATTORNEYS, JAMES A.

RAEON, P.O. BOX 1237, COEUR d'ALENE, ID, 83816, AND WILLIAM B. LATTA, JR., P.O. BOX 2192, BOISE, ID, 83701-2192, AND THE CLERK OF THE COURT, NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants Marion Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers, appeal against the above named respondent to the Idaho Supreme Court from that portion of the Order denying these Defendants' Motion to Dismiss, considered by the Court as a Motion for Summary Judgment, rejecting their defense of qualified immunity under 42 U.S.C. § 1983, entered in the above entitled action on the 23rd of February, 1996, Honorable Judge Michaud presiding.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 above is an appealable order under and pursuant to the long-standing case law of qualified immunity under 42 U.S.C. § 1983, most recently affirmed in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). The U.S. Supreme Court in *Behrens* held that a government official asserting a defense of qualified immunity under 42 U.S.C. § 1983 has an immediate right of appeal of an unfavorable immunity ruling upon either a motion to dismiss or a motion for summary judgment.

3. The reporter's transcript is not requested.

4. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.: All briefs and memorandums in support or opposition to Defendant's Motion to Dismiss.

5. I certify:

(a) That a copy of this notice of appeal has been served on the reporter.

(b) That the appellant is exempt from paying an estimated transcript fee because no transcript has been requested.

(c) That the appellants are exempt from paying the estimated fee for the preparation of the clerk's record because the State of Idaho and its officers are exempt from paying fees for the preparation of the clerk's record.

(d) That the appellants are exempt from paying the appellate filing fee because the State of Idaho and its officers are exempt from paying appellate filing fees.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 4th day of April, 1996.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
/s/ Nicole S. McKay
Deputy Attorney General

APPENDIX D

ALAN G. LANCE
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IN THE SUPREME COURT OF IDAHO

KRISTINE L. FANKELL, Plaintiff/Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants/Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendants.	)	Appeal No. 22880 **DEFENDANTS-APPELLANTS' PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL AND MEMORANDUM SUPPORTING PETITION FOR REHEARING**

Defendants-Appellants, by and through their attorney of record, Michael S. Gilmore, Deputy Attorney General, petition for rehearing from the Court's order of April 23, 1996, dismissing their appeal. This petition for

rehearing presents a single legal issue for the court's consideration:

ISSUE ON PETITION FOR REHEARING

When a plaintiff's complaint is based in whole or in part upon claims under 42 U.S.C. § 1983, and the defendants move to dismiss under Rule 12(b)(6) and/or move for summary judgment based in whole or in part upon their claim of qualified immunity under 42 U.S.C. § 1983, is the trial court's order denying the motion to dismiss and/or motion for summary judgment a final order appealable as a matter of right with regard to the issue of denial of a claim of qualified immunity?

STATEMENT OF FACTS

Kristine L. Fankell, the Plaintiff-Respondent in this case, filed a Complaint against persons including the Defendants-Appellants Marian Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers. See Exhibit 1. That Complaint was grounded in allegations of violations of 42 U.S.C. § 1983, in particular, in deprivation of property without due process of law. *Id.* at ¶¶ 2, 22 and 28. Defendants-Appellants moved to dismiss the Complaint pursuant to I.R.C.P. 12(b)(6). See Exhibit 2. Among other things, Defendants' memorandum in support of their motion to dismiss asserted their defense of qualified immunity under 42 U.S.C. § 1983. See Exhibit 3, pp. 2, 6-13.

The district court treated Defendants-Appellants' motion as a motion for summary judgment under Rule 56

rather than a motion to dismiss under Rule 12(b)(6). On February 23, 1996, the clerk of the court entered the district court's order denying the Defendants-Appellants' motion. See Exhibit 4. On April 4, 1996, the Defendants-Appellants filed a timely Notice of Appeal. See Exhibit 5. Paragraphs 1 and 2 of that Notice of Appeal provided the following:

> 1. The above named appellants Marion Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers, appeal against the above named respondent to the Idaho Supreme Court from that portion of the Order denying these Defendants' Motion to Dismiss, considered by the Court as a Motion for Summary Judgment, rejecting their defense of qualified immunity under 42 U.S.C. § 1983, entered in the above entitled action on the 23rd of February, 1996, Honorable Judge Michaud presiding.
>
> 2. That the parties have a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 above is an appealable order under and pursuant to the long-standing case law of qualified immunity under 42 U.S.C. § 1983, most recently affirmed in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). The U.S. Supreme Court in *Behrens* held that a government official asserting a defense of qualified immunity under 42 U.S.C. § 1983 has an immediate right of appeal of an unfavorable immunity ruling upon either a motion to dismiss or a motion for summary judgment.

On April 23, 1996, the clerk of the Supreme Court issued an Order Dismissing Appeal. See Exhibit 6. The body of the Order Dismissing Appeal said:

> The NOTICE OF APPEAL is from an Order Denying a Motion for Summery [sic] Judgment, which is not appealable under I.A.R. 11; however, the Appellants state in the Notice of Appeal that it is appealable under 42 U.S.C. § 1983 and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L. Ed. 2d 773 (1996). The Court has reviewed the Notice of Appeal and statement by Appellants' therefore, after due consideration,
>
> IT HEREBY IS ORDERED that the NOTICE OF APPEAL be, and hereby is, DISMISSED for the reason it is not from a final order or judgment.

The Defendants-Appellants contend in this petition for rehearing that the district court's order denying their motion is a final order to the extent that it has denied their claim of qualified immunity under 42 U.S.C. § 1983 and that they have a right to appeal that part of the order denying the claim of qualified immunity under Idaho Appellate Rule 11(a)(1). Alternatively, if they do not have that right, then they have a right to appeal that part of the order denying the claim of qualified immunity as a matter or [sic] federal law in order to prevent discrimination by a state court against a federal claim or defense.

Legal Argument

I. The District Court's order denying the defendants' motion for summary judgment is a final order to the extent that it denies a claim of qualified immunity under 42 U.S.C. § 1983, and defendants have a right to appeal the part of the order denying their claim of qualified immunity under I.A.R. 11(a)(1)

42 U.S.C. § 1983 is a federal statute. Suits brought under 42 U.S.C. § 1983 alleging a state employee's violation of a federal constitutional right present the same issues of liability and immunity as so-called *Bivens* actions brought against federal employees directly under the federal constitution.[1] Qualified immunity is one of the defenses that may be asserted by state employees when they are sued under 42 U.S.C. § 1983. *Arnzen v. State*, 123 Idaho 899, 904-06, 854 P.2d 242, 247-49 (1993). The Supreme Court of the United States has equated the qualified immunity defenses available in cases brought under 42 U.S.C. § 1983 and *Bivens* cases:

> Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state

[1] *Bivens* actions are named after the decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

> officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

Butz v. Economou, 438 U.S. 478, 504, 98 S. Ct. 2894, 2909, 57 L. Ed. 2d 895 (1978). See, also, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, n. 30, 102 S. Ct. 2727, 2738, n. 30, 73 L. Ed. 2d 396 (1982); *Malley v. Briggs*, 475 U.S. 335, 340, n. 2, 106 S. Ct. 1092, 1095, n. 2, 89 L. Ed. 2d 271 (1986).

As a matter of practice, courts do not distinguish between the immunities available under 42 U.S.C. § 1983 and in *Bivens* actions, citing opinions in both kinds of cases interchangeably in an explication of immunity law. See, *e.g.*, *Arnzen*, 123 Idaho at 904, 854 P.2d at 247, which cites *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (*Bivens* claim against federal officer), *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (*Bivens* claim against federal officer), *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (*Bivens* claim against federal agent), and *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (section 1983 claim against state officer), in explication of qualified immunity defenses under 42 U.S.C. § 1983.

Denials of qualified immunity are immediately appealable as final orders. In the recent case of *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773

(1996), the Supreme Court of the United States explained the significance of a qualified immunity defense in a *Bivens* case and that denial of a claim of qualified immunity in such a case is a final, appealable decision, be the denial at the stage of a Rule 12(b)(6) motion or a motion for summary judgment. Of course, its comments on finality are also applicable to the case now before the Court, which is brought under 42 U.S.C. § 1983:

> Section 1291 of Title 28, U.S.C., gives courts of appeals jurisdiction over "all final decisions" of district courts. . . . It does not, however, bar review of all prejudgment orders. In *Cohen* [*v. Beneficial Industrial Loan Corp.*, 336 U.S. 541, 546, 69 S. Ct. 1221, 1225, 93 L. Ed. 2d 1528 (1949),] we described a "small class" of district court decisions that, though short of final judgment, are immediately appealable because they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself that it require that appellate consideration be deferred until the whole case is adjudicated." *Ibid.* . . . The issue in the present case is the extent to which orders denying governmental officers' assertions of qualified immunity come within the *Cohen* category of appealable decisions.
>
> As set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), the qualified-immunity defense "shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *id.*, at 818, 102 S. Ct., at 2738 (citing *Procunier v.*

> *Navarette*, 434 U.S. 555, 565, 98 S. Ct. 855, 861, 55 L. Ed. 2d 24 (1978)). *Harlow* adopted this criterion of "objective legal reasonableness," rather than good faith, precisely in order to "permit the defeat of insubstantial claims without resort to trial." 457 U.S., at 879, 813, 102 S. Ct., at 2739, 2735-2736. Unsurprisingly, then, we later found the immunity to be "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal [immunity] question." *Mitchell v. Forsyth*, [472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985)]. And, as with district-court rejection of claims to other such entitlements distinct from the merits, see, *e.g.*, *Puerto Rico Aqueduct [and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-146, 113 S. Ct. 684, 688-689, 124 L. Ed. 2d 605 (1993)] (Eleventh Amendment immunity); *Abney v. United States*, 431 U.S. 651, 662, 97 S. Ct. 2034, 2041-2042, 52 L. Ed. 2d 651 (1977) (right not to be subjected to double jeopardy), we held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell, supra*, at 530, 105 S. Ct., at 2817. See also *Johnson v. Jones*, 515 U.S. ___, ___-___, 115 S. Ct. 2151, 2155-2156, 132 L. Ed. 2d 238 (1995).

___ U.S. at ___, 116 S. Ct. at 838-39. As the Court clarified: "*Mitchell* clearly establishes that an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary-judgment stage is a 'final' judgment subject to immediate appeal." ___ U.S. at ___, 116 S. Ct. at 839.

Drawing upon these precedents, the Supreme Court concluded that the defendants were entitled to bring successive appeals – the first from the denial of their motion to dismiss under Rule 12(b)(6) on the basis of qualified immunity, and the second from the denial of their motion for summary judgment on the basis of qualified immunity – because each decision was final from the point of view of the defendant claiming immunity, *i.e.*, each was a final determination whether the defendant would be subject to discovery or trial, which are the two things that immunity would shield the defendants from. ___ U.S. at ___, 116 S. Ct. at 839-41.[2] That the decision in *Behrens*, which is a *Bivens* case, would also apply to a § 1983 case is apparent by the Court's unqualified discussion of the rules of appeal of qualified immunity defenses in the case of *Johnson v. Jones*, 515 U.S. ___, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), a case decided under § 1983. ___ U.S. at ___, 116 S. Ct. at 842.

To be sure, the cases previously cited, whether § 1983 cases or *Bivens* cases, were decided under federal procedural statutes, and one might argue that the cases stand

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[2] The appellate court's review of the trial court's decision denying qualified immunity does not prevent issues unrelated to qualified immunity proceeding to trial. *Cf. Behrens*, ___ U.S. at ___, 115 S. Ct. at 841. Whether the entire case should be stayed while awaiting appellate review of the qualified immunity defense or the remainder of the case should proceed to trial is a matter within judicial discretion. But, the right to appellate review of issues associated with denial a claim of qualified immunity cannot be defeated by the defendants' obligation to stand trial on unrelated issues. ___ U.S. at ___, 115 S. Ct. at 841-42.

for nothing more than a construction of federal law concerning finality for purposes of appeal. Were the right to appeal from a denial of a 12(b)(6) motion to dismiss on the basis of qualified immunity or the right to appeal from the denial of a motion for summary judgment on the basis of qualified immunity merely a procedural right alone, Defendants-Appellants would accept that premise. But, the cases cited make it clear that the right protected is more than procedural – it is substantive:

> *Mitchell* bears particularly on the present case. There, the Attorney General of the United States appealed from a district court order denying his motion to dismiss on grounds of qualified immunity. The court of appeals held that the order was not appealable and remanded the case for trial. We reversed, holding that the order denying qualified immunity was a collateral order immediately appealable under *Cohen*. We found that absent immediate appeal, the central benefits of qualified immunity – avoiding the costs and general consequences of subjecting public officials to the risk of discovery and trial – would be forfeited. . . . "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell, supra*, at 526, 105 S. Ct., at 2815 (emphasis in original).

Puerto Rico Aqueduct, 506 U.S. at 143-44, 113 S. Ct. at 687 (footnote omitted).

The right to be spared the time and expense of discovery or trial under a claim of qualified immunity is a substantive benefit. The right to appeal from the denial of a 12(b)(6) motion on grounds of qualified immunity or to

appeal from the denial of a motion for summary judgment on grounds of qualified immunity is a final order regarding that substantive right. The Defendant-Appellants' appeal is squarely within the list of appealable orders in Idaho Appellate Rule 11(a)(1):

> **Rule 11. Appealable judgments and orders.** – An appeal as a matter of right may be taken to the Supreme Court from the following judgments and orders:
>
> (a) Civil Actions. From the following judgments and orders of a district court in a civil case:
>
> (1) Judgments, *orders* and decrees *which are final*, including orders of the district court granting or denying peremptory writs of mandate and prohibition.

Emphasis added. Because the order denying a claim of qualified immunity[3] not to stand trial for a claim brought under 42 U.S.C. § 1983 is a final order, it is appealable under I.A.R. 11(a)(1).

---

[3] This same argument on appealability of orders denying claims of qualified immunity would apply to claims of the absolute immunity defenses recognized under 42 U.S.C. § 1983: *e.g.*, legislative immunity, judicial immunity, prosecutorial immunity, testimonial immunity.

II. If the Defendants-Appellants have no right under I.A.R. 11(a)(1) to appeal the part of the district court's order denying their claim of qualified immunity, then they have a right to appeal that part of the order denying the claim of qualified immunity as a matter of federal law to prevent state court discrimination against a federal claim or defense

State courts must apply the federal rules of substantive law in a case brought under 42 U.S.C. § 1983. This is clear from the case of *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). In *Howlett* Florida citizens sued local school board members and school officials in state courts under 42 U.S.C. § 1983. Despite the precedent that local governments like municipalities or school boards were persons subject to suit under 42 U.S.C. § 1983, see *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Florida courts held that Florida had not waived a municipality's sovereign immunity from suit under 42 U.S.C. § 1983, so the Florida state courts would not entertain suits against municipalities under that statute. The Supreme Court of the United States reversed. In doing so, it explicated the relationship between state courts, state law, and federal law under 42 U.S.C. § 1983, noting that the Florida District Court of Appeal's "holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action." 496 U.S. at 366, 110 S. Ct. at 2437. The Court elaborated:

> Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The

Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

. . . .

Three corollaries follow from the proposition that "federal" law is part of the "Law of the Land" in the State:

1. A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a "valid excuse." [Citation omitted.] "The existence of the jurisdiction creates an implication of duty to exercise it." [Citations omitted.]

2. An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because a disagreement with its content or refusal to recognize the superior authority of its source. . . .

3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. [Citations omitted.] The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. . . . In addition, States may apply their own neutral procedural rules to federal

claims, unless those rules are pre-empted by federal law. [Citations omitted.]

496 U.S. at 367-72, 110 S. Ct. at 2438-41 (footnote omitted).

There were only three cases in which the Supreme Court of the United States accepted a state court claim that its neutral rules of procedure or jurisdiction prevented the state court from exercising jurisdiction over a federal claim according to federal law: where state statute permitted discretionary dismissal of both federal and state claims when neither plaintiff ~~nor~~ defendant were resident of the state, *Douglas v. New York, N.H. & H.R. Co*, 279 U.S. 377, 49 S.Ct 355, 73 L. Ed. 747 (1929); where a city court was denied jurisdiction of both state and federal claims that arose outside its territory, *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L. Ed. 789 (1940); and where a state court applied a neutral doctrine of *forum non conveniens, Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 71 S.Ct. 1, 95 L. Ed. 3 (1950). 496 U.S. at 474-75, 110 S.Ct. 15 2442. None of those situations are present here.

Idaho does not prohibit its courts at either the trial or appellate level from considering claims brought under 42 U.S.C. § 1983. Idaho Appellate Rule 11 explicitly authorizes certain appeals from orders preceding final judgment, including those from "[a]n order granting . . . a new trial, including such orders which contain a conditional grant . . . of a new trial subject to additur and remittitur," I.A.R. 11(a)(5); "[a]ny order however denominated, reducing a charge of criminal conduct over the objection of the prosecutor," I.A.R. 11(c)(5), or "[a]n order granting a motion to suppress evidence," I.A.R. 11(c)(8). Given the availability of appellate jurisdiction in Idaho

under state law for certain kinds of orders preceding final judgments, the state cannot discriminate against federal claims or defenses by denying the Defendants-Appellants' federal right to appeal from the denial of their motion for summary judgment upon a claim of qualified immunity under 42 U.S.C. § 1983.

Summary

The Defendants-Appellants therefore pray that the Court reconsider its Order Dismissing Appeal and pray that the Court reinstate their appeal from the district court's denial of their motion for summary judgment based upon a claim of qualified immunity under 42 U.S.C. § 1983.

Dated this 2nd day of May, 1996.

State of Idaho
Office of the Attorney General

By _____
/s/ Michael S. Gilmore
Deputy Attorney General

(2)

Supreme Court, U.S.
FILED
SEP 23 1996
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No. 96-292

In The

Supreme Court of the United States

October Term, 1995

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

or, in the Alternative,
MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS TO THE CLERK OF THE SUPREME COURT OF THE STATE OF IDAHO, FREDERICK C. LYON

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QUESTION PRESENTED FOR REVIEW

Where Idaho's neutral procedural rules provide that a party must obtain certification from the trial court prior to appealing an interlocutory decision, are Idaho state courts compelled to disregard the state rules and adopt federal appellate procedures by providing immediate appeals from a ruling denying state officials' claims of qualified immunity under 42 U.S.C. § 1983?

STATUTORY AND RULE PROVISIONS

42 U.S.C. § 1983 and Idaho Appellate Rule 11 are set out in Petitioner's Brief at 2, 3. Idaho Rule of Civil Procedure 54(b) is set out in Appendix A at 1a.

STATEMENT OF THE CASE

Factual and Procedural Background

Respondent Kristine Fankell brought claims, including under 42 U.S.C. § 1983, against state actor Petitioners for wrongful termination from state employment. Upon motion to dismiss, treated as a motion for summary judgment, the trial court denied the state actor's request for a qualified immunity defense, without comment. Appendix B at 3a. Petitioner's appeal was taken from the order entered denying the motion to the Idaho Supreme Court. See Petition at 6a, ¶ 2. The Clerk of the Idaho Supreme Court entered an order dismissing the appeal, Petition at 1a, and, later, another order denying a petition for rehearing on the appeal, Petition at 3a. Both orders note the trial court's order is not a final order under Idaho law.

REASONS FOR DENYING THE PETITION

1. No substantial federal question is presented here. The decision below rests on state procedural rules grounds that are not preempted by federal law.

The dismissal of Petitioners' appeal reflects Idaho civil and appellate procedures that provide that interlocutory decisions, here one denying a summary judgment motion, cannot be appealed unless a party first obtains a certification of finality from the trial court under Rule

54(b) of the Idaho Rules of Civil Procedure. Petitioners failed to obtain the certificate. Therefore, their appeal was properly dismissed under Idaho law: the trial court's decision was not a final order from which an appeal may be taken.

Section 1983 does not preempt such state procedural rules. The state's decision to apply its own rules, rather than the federal rule in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), does not impair any federal interests. The interests protected by *Mitchell's* holding, a defendant denied the qualified immunity defense may automatically appeal in the federal courts, are predominately *state* interests in state officers being able to avoid the burden of trial and discovery. This state interest is not a federal or an individual interest. Idaho, however, also has an interest in applying its own rules of civil and appellate procedure to cases brought in its courts. When a state decides that its interests in protecting state officers from the burden of discovery and trial are sufficiently protected by allowing appeals only after a certification of finality by the trial court, here to a specific issue which is subject to review (*Mitchell*) in accordance with local neutral rules (I.R.P.C. 54(b) and I.A.R. 11(a)), rather than automatic appeals, no substantial federal interest is implicated. Supreme Court review is inappropriate in the circumstances presented by this Petition.

Moreover, Petitioners' suggestion that Idaho procedures wholly foreclose any opportunity for appellate review is inaccurate. A direct, simple request to the trial court, citing the authority of law outlined in the Petitioner's request for rehearing before the Idaho Supreme Court, Petition at 8a, likely would have resulted in the issuance of the 54(b) certificate. The two orders of the

Clerk, and the pending Petition, would have been avoided for good reason: the denial of the defense is reviewable in accordance with neutral local rule.

2. The differences in state court procedures provide no basis justification for Supreme Court review.

The different state court rulings identified in the Petition, at 6-13, do not provide a justification for Supreme Court review. These rulings merely reflect the fact that different states have adopted different procedures for interlocutory appeals. Some states have found *Mitchell* persuasive and have adopted the federal procedure. Other states, like Idaho, have different procedures that do not permit automatic appeals. The Supreme Court does not have authority to resolve differences among state courts. Congress has not mandated that states apply uniform procedural rules to Section 1983 actions. The Supreme Court has recognized the differences are to be honored:

> 3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. [Citations omitted.] The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necesarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." [Citations omitted.] *The States thus have great latitude to establish the structure and jurisdiction of their own*

courts. [Citations omitted.] In addition, States may apply their own neutral procedural rules to federal claims unless those rules are preempted by federal law.

496 U.S. 372, Petition at 20a, 21a. Emphasis added to insert omitted sentence.

Idaho's Rules, civil and appellate, provide neutral procedures, not preemptive of federal law. The applicable Idaho Rules require the Petitioners to obtain a certificate of finality to appeal the denial of qualified immunity defense. The Petitioners insistence on their approach to procedure, not the applicable Rules of the Idaho Supreme Court, may be declined.

3. The Idaho Supreme Court's Order does not conflict with *Mitchell.*

Mitchell v. Forsyth, supra (and *Behrens v. Pelletier,* ___ U.S. ___, 116 S.Ct. 834 (1996)) address the application of the federal statute governing appeals, 29 U.S.C. § 1291, and the federal collateral order doctrine to rulings on qualified immunity under Section 1983. Nothing in either decision holds, or even suggests, that states must construe their own statutes and rules governing appeals to conform to the federal rule. Nor is there anything in Section 1983 or in either decision that suggests that Congress intended to compel state courts to follow federal procedures when Section 1983 claims are brought in state court. Consequently, there is no conflict between the state's ruling and this Court's decisions that would justify review by this Court.

4. The Idaho Supreme Court recognizes the role of qualified immunity and, where properly presented, will apply it.

In Idaho, an interlocutory appeal is available to review the question presented by the denial of the state actors' request for dismissal/summary judgment upon the trial court's issuance on a certificate pursuant to I.R.C.P. 54(b). No decision of the Idaho Supreme Court holds otherwise; the application and importance of the defense of qualified immunity is completely recognized in Idaho law. See *Arnzen v. Richardson,* 854 P.2d 242, at 246-248, 123 ID 899, at 904-906 (1993); *Farnworth v. Femling,* 869 P.2d 1387, 125 ID 283 (1994) and *Lubcke v. Boise City/Ada County Housing Authority,* 860 P.2d 653, 124 ID 450 (1993). Unless and until the Idaho Supreme Court holds otherwise, denials of the defense of qualified immunity are immediately appealable in accordance with applicable, neutral rules.

CONCLUSION

No holding of this Court requires states to hear an interlocutory appeal in derogation of their rules. The Petition should be denied.

Respectfully submitted
on behalf
of Respondent
Kristine Frankell by

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APPENDIX A

Idaho Rule of Civil Procedure 54(b) Judgment upon multiple claims or involving multiple parties.

(1) Certificate of Final Judgment. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment upon one or more but less than all of the claims or parties only upon an express determination that there is no just reason for delay and upon express direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the actions as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. If any parties to an action are entitled to judgment against each other such as on a claim and counterclaim, or upon cross-claims, such judgments shall be offset against each other and a single judgment for the difference between the entitlements shall be entered in favor of the party entitled to the larger judgment. In the event the trial court determines that a judgment should be certified as final under this Rule 54(b), the court shall execute a certificate which shall immediately follow the court's signature on the judgment and be substantially the following form:

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this _____ day of _____, 19___.

_____

(Signature – District Judge)

APPENDIX B

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

KRISTINE L. FANKELL, PLAINTIFF, VS. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY DEFENDANTS	CASE NUMBER: CV95-00529 ORDER

Pursuant to Defendant's Motion to Dismiss previously filed herein, this matter came on for hearing on the 13th day of February, 1996, wherein the Plaintiff appearing by and through her Attorney of Record, James A. Raeon, and the Defendant appearing by and through its

Attorney of Record, Nicole McKay, Deputy Attorney General, and after a review of the record and files herein, the Motions and Briefs submitted in support thereof;

NOW, THEREFORE,

IT IS FURTHER HEREBY ORDERED that the Defendant's Motion to Dismiss, which was considered by this Court as a Motion for Summary Judgment, is hereby denied.

IT IS FURTHER HEREBY ORDERED that the Idaho State Liquor Dispensary is dismissed as a party Defendant in the above entitled action.

DONE AND ENTERED this 22 day of February, 1996.

/s/ J.R. MICHAUD
JAMES R. MICHAUD
DISTRICT JUDGE

No. 96-292 (4)

Supreme Court, U.S.
FILED
SEP 27 1996
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In The

Supreme Court of the United States

October Term, 1995

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

or, in the Alternative,
MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF MANDAMUS TO THE CLERK OF THE SUPREME COURT OF THE STATE OF IDAHO, FREDERICK C. LYON

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ARGUMENT

Petitioners presented the issue for review whether defendants in a state court case brought under 42 U.S.C. § 1983 have a federal right to immediate appellate review of the denial of their motion to dismiss or motion for summary judgment based on a qualified immunity defense. Respondent's Brief in Opposition to a Writ of Certiorari contended that the Court should not grant the petition because Idaho Rule of Civil Procedure 54(b) provides a mechanism for reviewing denial of such motions. Respondent is incorrect.

Idaho's Rule 54(b) is modeled on the federal rule and has the same provisions: " . . . when more than one claim for relief is presented in an action . . . the court may direct entry of a final judgment upon one or more but less than all of the claims. . . . " Under this rule, a trial court cannot certify individual issues that must be decided to reach the ultimate decision on a claim. *Thorn Creek Cattle Assn. v. Bonz*, 122 Idaho 42, 45, 830 P.2d 1180, 1183, *cert. denied*, 506 U.S. 962, 113 S. Ct. 432, 121 L. Ed. 2d 352 (1992). Thus, an Idaho trial court cannot certify the denial of a defense of qualified immunity because denial of that defense does not completely resolve the claim. Therefore, Respondent's interpretation of Idaho's Rule 54(b) is clearly incorrect

and should not be the basis of denial of the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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Petitioners,

vs.

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Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF OF THE COMMONWEALTH OF KENTUCKY AND THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WEST VIRGINIA, WISCONSIN AND THE TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF AMICI CURIAE

Every state-court system hears civil rights actions brought under 42 U.S.C. § 1983, and thousands of these actions are filed on a yearly basis. Qualified immunity, the primary defense raised by public officials against frivolous claims, is critically important to the effective operation of state government. By shielding good faith decisions and reasonable acts of public officers, the immunity ensures that the exercise of discretion by public officers is not chilled and that public interests continue to be served.

In federal courts, there is a right to immediately appeal a pre-trial denial of the qualified immunity defense. This Court has repeatedly stated that without an immediate appeal, one of the primary benefits of immunity, which is an immunity from discovery and from standing trial, is effectively lost. Yet, state courts are divided on whether a denial of a qualified immunity motion is immediately appealable in state court. Some state courts reason that under this Court's precedent, a state law that prohibits an immediate appeal of a pre-trial denial of qualified immunity effectively extinguishes the federal immunity and, therefore, is preempted. Other state courts have held the opposite, concluding a state law preventing an immediate appeal can be applied, even if the entitlement to immunity is thereby defeated. Amici curiae states hold a common view that the importance of this issue to state governments impacted by section 1983 litigation warrants further review of this case by this Court.

SUMMARY OF ARGUMENT

This Court held in *Felder v. Casey,* 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), that when section 1983 actions are brought in state courts, these courts must proceed in such a manner that the substantial rights of the parties under federal law are protected. Qualified immunity is a critical federal defense to public officials sued in state court and, under this Court's precedent, it should not be extinguished by state law. Nevertheless, while some state appellate courts acknowledge this principle and accept immediate appeals from pre-trial denials of qualified immunity, other state courts, by refusing to accept immediate appeals because of state procedural rules, are effectively eliminating the immunity in those cases when the trial court's initial determination was erroneous.

This split in the state appellate court decisions needs to be resolved. Qualified immunity is too important to the effective functioning of state government for it to be threatened in this manner. This Court held in *Scheuer v. Rhodes,* 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), held that when Congress enacted 42 U.S.C. § 1983, it did not intend to abrogate the immunity defenses and that these defenses are imperative to the sound exercise of discretion by public officials and the effective operation of government. The importance of this federal immunity defense is further enhanced by this Court's precedent that state law immunities cannot be raised in section 1983 litigation. *Howlett v. Rose,* 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). Further review is warranted in this case to protect the federal immunity defense and to clarify that this Court's precedent preempting state law that

defeats federal rights in section 1983 litigation applies to protect the rights of section 1983 defendants as well as section 1983 plaintiffs.

REASON FOR GRANTING THE PETITION

It Is Important To The States That This Court Clarify That A Denial Of Qualified Immunity In A Section 1983 Action Brought In State Court Is Immediately Appealable

In *Felder v. Casey,* 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), this Court examined the circumstances under which state law is preempted when a section 1983 claim is brought in state court. *Felder* involved a procedural notice-of-claim statute that was being applied by the State of Wisconsin to section 1983 actions. This Court held that the notice-of-claim statute was preempted because it was inconsistent with federal law and would produce different outcomes in section 1983 litigation based solely on whether the claim was asserted in state or federal court. In reaching its decision, the court stated that while "States may establish the rules of procedure governing litigation in their own courts" when they "entertain a federally created cause of action, 'the federal right cannot be defeated by the forms of local practice.' " 487 U.S. at 138 quoting *Brown v. Western R. Co. Of Alabama,* 338 U.S. 294, 296, 70 S. Ct. 105, 106, 94 L. Ed. 100 (1949). The Court further stated that the "Supremacy Clause imposes on state courts a constitutional 'duty to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' " *Id* at 151, quoting *Garret v. Moore-McCormack Co.,* 317 U.S.

239, 245, 63 S. Ct. 246, 251, 87 L. Ed. 239 (1942). More recently, in *Howlett v. Rose*, 496 U.S. 356, 472, 110 S. Ct. 2430, 2441, 110 L. Ed. 2d 332 (1990), this Court, in holding that the Supremacy Clause prevented Florida from refusing to entertain a section 1983 claim against a school board on sovereign immunity grounds, reiterated that while states may generally apply their own "neutral procedural rules to federal claims," those rules can be "preempted by federal law."

Pursuant to *Felder*, a section 1983 defendant who is sued in state court should be entitled to an immediate appeal if the qualified immunity defense is denied at the trial court level. *Felder's* admonishment that a state court entertaining a federal action must proceed in such a manner that all the substantial rights of the parties are protected applies here. That the federal qualified immunity defense is a substantial right is clear. The immunity is so important that this Court recently held in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 113 L. Ed. 2d 773 (1996), which presents the federal analog of section 1983 actions against state actors, not only that the "right is important enough to support an immediate appeal," but that a defendant is entitled to two immediate appeals if he raises the immunity defense in both a motion to dismiss and later in a motion for summary judgment. That the immunity is completely sacrificed if a state court refuses to grant an immediate appeal following an erroneous trial court determination is also apparent. This Court has stated in both *Behrens* and *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411, that the immunity is an entitlement not to stand trial and that

entitlement is irretrievably lost as soon as the case proceeds to litigation.

Relying on *Felder*, the appellate courts of several states have concluded that they must accept immediate appeals because of the primacy of federal law and the principle that the federal rights of the parties in section 1983 litigation cannot be extinguished by state law. *See City of Lakewood v. Brace*, 919 P.2d 231 (Colo. 1996); *Lord v. Murphy*, 561 A.2d 1013, 1016 (Mo. 1989); *McLin v. Trimble*, 795 P.2d 1035 (Okla. 1990). However, other state appellate courts have, in effect, concluded that section 1983 litigants take the state courts as they find them, regardless of whether state law defeats a substantial federal right or defense. *See, e.g., Klindtworth v. Burkett*, 477 N.W.2d 176 (N.D. 1991); *Ohio Civil Service Employees Association v. Moritz*, 39 Ohio App. 3d 132, 529 N.E.2d 1290 (Ct. App. 1987); *Noyola v. Flores*, 740 S.W.2d 493 (Tex. Ct. App. 1987). A third approach taken by state appellate courts is to grant an appellant review on a discretionary basis, allowing immediate review only on a case-by-case basis at the appellant court's discretion. *See Ex Parte Franklin County Dept. of Human Resources*, 674 So.2d 1277 (Ala. 1996); *Waldon v. City of Seattle*, 77 Wash. App. 784, 892 P.2d 745 (Ct. App. 1995); *Baxter v. Wisconsin Dept. of Natural Resources*, 165 Wis. 2d 293, 477 N.W.2d 648 (1992).

Amici curiae states believe that it is important that this conflict be resolved and the qualified immunity defense protected. Obviously, qualified immunity is critical to the thousands of state actors sued each year in state court as a protection against the depletion of resources and time that discovery imposes and the burdens of standing trial. Just as importantly, however, the immunity

defense is critical to the effective operation of state government. The immunity is a protection against attacks on reasonable official acts and decisions. By shielding reasonable official acts and decisions, the immunity serves the valuable purpose of protecting the efficient operation of government and ensuring that public officers need not have their actions and decision-making chilled by the fear of prolonged litigation over their reasonable exercise of discretion.

In *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), this Court held that Congress did not intend to abrogate the common law immunities when enacting 42 U.S.C. section 1983. The Court went on to reason that the qualified immunity defense is critical to the sound operation of government, stating "the public interest requires decisions and action to enforce laws for the protection of the public" and that "[i]mplicit in the idea that officials have some immunity – absolute or qualified – for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." 416 U.S. at 241-42. This Court further observed that "the privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Id.*, quoting *Barr v. Matteo*, 360 U.S. 564, 572-73, 79 S. Ct. 1335, 1340, 3 L. Ed. 2d 1434 (1990).

It is of vital import to state government that the qualified immunity defense remain intact. As the law now stands, elements of a section 1983 claim cannot be extinguished by state law, including state procedural law,

see Felder v. Casey, supra, and a section 1983 defendant in state court cannot raise a state defense. *See Howlett v. Rose, supra.* The same principle that was applied in *Felder v. Casey* to section 1983 plaintiffs in state court should apply to section 1983 defendants. Congress did not intend that section 1983 defendants would be without immunity defenses, and the effective functioning of state government demands that the qualified immunity defense remain intact regardless of the forum in which a section 1983 claim is brought. Under *Felder,* state laws that defeat substantial rights of the parties in 1983 litigation are preempted. This principle should be applied to state procedural rules that, by rejecting an immediate appeal from a pretrial denial of a qualified immunity defense, effectively extinguishes the protection altogether. Moreover, when state actors are sued under federal law, their ability to present their federal defenses should not depend on the happenstance at which state-court system they are sued in.

Amici urge that further review in this case is warranted to clarify this important issue.

CONCLUSION

When Congress enacted 42 U.S.C. § 42, it did not intend to abrogate the immunity defenses. Qualified immunity is a critical defense not only to the individual section 1983 defendants sued in state court, but also to state government generally. The immunity, by protecting

the reasonable decisions and acts of public officials, protects the effective operation of government. State government cannot afford to have this defense extinguished and such was not Congress' intent. The immunity should not be defeated simply because of the forum in which a section 1983 claim is brought, yet this is what state rules that prohibit an immediate appeal from a pretrial denial of qualified immunity accomplish. This case presents this Court with an ideal opportunity to resolve the current split in state Supreme Court decisions regarding this issue and clarify that the principles articulated in *Felder v. Casey*, apply to section 1983 defendants, as well as to plaintiffs.

Amici urge this Court to grant the Petition and issue a Writ of Certiorari to the Supreme Court of the State of Idaho.

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No. 96-292

In The

Supreme Court of the United States

October Term, 1996

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Idaho

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Petition For Certiorari Filed August 20, 1996
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April 11, 1995	Civil Complaint and Demand for Jury Trial filed
April 25, 1995	First amended complaint filed
July 5, 1995	Defendants' Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6) and Motion for Award of Attorneys' Fees filed
July 5, 1995	Memorandum in Support of Defendants' Motion to Dismiss filed
December 1, 1995	Plaintiff's Response to Defendants' Motion to Dismiss filed
December 21, 1995	Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss filed
February 23, 1996	Order Denying Motion to Dismiss Except for Idaho State Liquor Dispensary entered
April 4, 1996	Notice of Appeal filed with trial court
April 23, 1996	Order that the Notice of Appeal is dismissed for the reason it is not from a final order or judgment entered
May 2, 1996	Defendants-Appellants' Petition for Rehearing from Order Dismissing Appeal and Memorandum Supporting Petition for Rehearing filed
May 23, 1996	Order Denying Petition for Rehearing from Order Dismissing Appeal entered and Appeal dismissed
May 23, 1996	Remittitur to the state trial court filed

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

Kristine L. Fankell, **Plaintiff,** **vs.** **Marian Johnson, Gordon Hubbard, Margo Edmiston, H. Dean Summers, John and Jane Does 1 - 10, each of them individually, and the Idaho State Liquor Dispensary,** **Defendants.**	**Case No.** CV-95-00529 **First Amended COMPLAINT and Demand for Jury Trial** (Filed April 25, 1995)

NATURE OF THE CASE

1. This is an action for the deprivation of the civil rights of the Plaintiff by the Defendant arising from her wrongful discharge from employment with the State of Idaho.

JURISDICTION

2. The District Court has concurrent jurisdiction with the Federal Courts to entertain actions brought pursuant to 42 U.S.C. §1983 and §1988 by virtue of *Maine v. Thiboutot*, 448 U.S. 1 (1980) and is therefore empowered to hear this case since the amount of damages are reasonably believed to be in excess of the Magistrate Court's jurisdictional amount under IRCP 82(c)(2)(A).

PARTIES

3. The Plaintiff, Kristine L. Fankell, is an adult, female citizen of the State of Idaho, at all times relating to the Complaint, living in Sandpoint, Idaho. She is a former, long time employee of the State of Idaho employed by the Idaho State Liquor Dispensary pursuant to I. C. §23-207(b).

4. The Defendant, Marian Johnson, is an individual, adult, female citizen of the State of Idaho, at all times relating to the Complaint, living in Sandpoint, Idaho. At all times which relate to this Complaint, she was the Store Director of Store #322 and the direct supervisor of the Plaintiff. She is sued in her individual capacity.

5. The Defendant, Gordon Hubbard, is an individual, adult, male citizen of the State of Idaho. At all times

which relate to this Complaint, he was the Regional Director for the Idaho State Liquor Dispensary and the direct supervisor of the Defendant Marian Johnson. On information and belief, the Plaintiff states Gordon Hubbard was consulted about, participated in, acted on, directed and/or ratified, in concert with the other named Defendants, the action of terminating the employment of the Plaintiff. He is sued in his individual capacity.

6. The Defendant, Margo Edmiston, is an individual, adult, female citizen of the State of Idaho, at all times relating to the Complaint, living in Boise, Idaho. At all times which relate to this Complaint, she was the Personnel Director for the Idaho State Liquor Dispensary. On information and belief, the Plaintiff states Margo Edmiston was consulted about, participated in, acted on, directed and/or ratified, in concert with the other named Defendants, the action of terminating the employment of the Plaintiff. She is sued in her individual capacity.

7. The Defendant, H. Dean Summers, is an individual, adult, male citizen of the State of Idaho, at all times relating to the Complaint, living in Boise, Idaho. At all times which relate to this Complaint, he was the Superintendent of the Idaho State Liquor Dispensary, appointed pursuant to I. C. §23-201, and charged with administering the general supervision and control of the Dispensary, including, specifically, the hiring and termination of employees like the Plaintiff in accordance with Title 67, Chapter 53, Idaho Code. On information and belief, the Plaintiff states H. Dean Summers was consulted about, participated in, acted on, directed and/or ratified, in concert with the other named Defendants, the action of

terminating the employment of the Plaintiff. He is sued in his individual capacity.

8. The Defendants, John and Jane Does 1-10, are believed to be adult citizens of the United States; their place of residence is presently unknown. On information and belief, the Plaintiff states the John and Jane Doe Defendants 1-10 consulted, participated, acted, directed, encouraged and/or ratified, in concert with the other named Defendants, the action of the Superintendent in terminating the employment of the Plaintiff. At all times which relate to the allegations in this Complaint, they are believed to have been duly appointed officers/employees/staff members of the Idaho State Liquor Dispensary for the State of Idaho. They are sued in their individual capacities.

9. The Defendant, the Idaho State Liquor Dispensary (Dispensary), is an entity of the State of Idaho, created and operating pursuant to Title 23, Chapter 2, Idaho Code. It was the employer of the Plaintiff. It is sued for injunctive relief.

FACTS

10. The Plaintiff, Kristine L. Fankell, was an employee of the Defendant from June 10, 1980, until April 22, 1993. From June 10, 1980 until August, 1992 she worked as a temporary employee of the Defendant located as necessary at the various stores of the Defendant in and around Sandpoint on a regular basis.

11. During the month of December, 1991, the Plaintiff applied for a permanent position with the Defendant

under the terms and conditions established in Title 67, Chapter 53, Idaho Code.

12. During January, 1992, she was tested or evaluated by the Idaho Personnel Commission. As a result of the test, she was placed on a register of potential employees eligible for hire, on or about February 6, 1992.

13. On August 2, 1992, she received an appointment to a probationary position as a liquor store clerk. An employee of the Dispensary, the Defendant Marian Johnson, was her hiring supervisor and at all times responsible for the training, evaluation and supervision of the Plaintiff.

14. From August 2, 1992, until her termination, the Plaintiff performed all duties assigned. This period included acting as Store Manager at Store #322 from January 11, until March 10, 1993 because Defendant Marian Johnson was on a leave of absence.

15. On information and belief, as a matter of practice in the local area, the assignment of the responsibility to act as Store Manager, during a period of absence of the regular Manager, is based on successful performance on the Idaho Personnel Commission test/evaluation. A personal favorite/friend of Defendant Johnson, one Stern, had not achieved a score allowing her to act as Store Manager and could not receive the designation for the period of the Johnson leave of absence.

16. Defendant Johnson intended to designate Stern as Store manager during her leave of absence, nonetheless. The Plaintiff objected to the selection process relating to Stern and requested the Dispensary headquarters

office make the decision regarding who would perform the duties during the Johnson absence. The Dispensary did and Plaintiff Fankell managed Store #322 during the Johnson leave of absence.

17. Upon returning from the leave of absence, Johnson evaluated the Plaintiff's work as of March 13, 1993, as "below expectation."

18. On or about April 2, 1993, the Plaintiff filed a grievance relating to the performance evaluation she had received. In violation of applicable policy and rule, no response to the grievance was made to the Plaintiff.

19. On or about April 7, 1993, State Liquor Superintendent H. Dean Summers notified the Plaintiff, based on the Johnson performance evaluation, that she had failed to successfully complete her initial probationary period. She was given the opportunity to resign or be terminated without cause. The Plaintiff declined to resign and her employment was terminated on April 22, 1993.

20. The Plaintiff received no performance evaluation relating to her termination as required by applicable rule.

CAUSES OF ACTION

Violation of Civil Rights: Substantive Due Process

21. At all times relevant, the individual Defendants were acting under color of law, that is, under color of the Constitution, statutes, laws, rules, regulations customs and practices of the State of Idaho.

22. At all times relevant, the individual Defendants and each of them, separately and in concert, engaged in acts and omissions which resulted in the firing of the Plaintiff from the employ of the Dispensary. This constituted a deprivation of the Constitutional rights, privileges and immunities of the Plaintiff: she was deprived of the property interest she had in her employment with the Dispensary and the benefits which accompanied that employment. While the termination was carried out under color of law, it had no justification or excuse. The termination was illegal, improper and unfounded and, therefore, unrelated to any activity in which they may appropriately and legally engage in the course of administering and directing the personnel affairs of the Dispensary.

23. The Plaintiff, having achieved permanent status by operation of law dictated by the passage of time, was terminated without cause assigned or adequate notice as Constitutionally required.

24. Each of the individual Defendants assisted, acted and actively engaged in the course of conduct leading to the Plaintiff's termination, upheld the action in reviewing it and continued to endorse it long after it had been accomplished. By so acting, each of the individual Defendants became a party to the injuries inflicted on the Plaintiff.

25. The Plaintiff's liberty interest in continuing employment with the State of Idaho free from the arbitrary, capricious and unreasonable impositions and restraints imposed by the individual Defendants is well settled in state and federal law.

26. The Plaintiff's property right to her employment was well settled in state law on April 22, 1993. The individual Defendants forfeited any qualified good faith immunity they might have enjoyed by engaging in a course of conduct directed at the Plaintiff which they knew or reasonably should have known was in violation of the Idaho Personnel Commission Act, Title 67, Chapter 53, Idaho Code: termination of a permanent, classified employee of the State of Idaho who possessed a property right in her employment which was taken away without proper cause or adequate notice.

Violation of Civil Rights: Procedural Due Process

27. At all times relevant, the individual Defendants were acting under color of law, that is, under color of the Constitution, statutes, laws, rules, regulations customs and practices of the State of Idaho.

28. At all times relevant, the individual Defendants and each of them, separately and in concert, engaged in acts and omissions which resulted in the denial of the Plaintiff's right to contest her unfair evaluation. This constituted a deprivation of the Constitutional rights, privileges and immunities of the Plaintiff: she was deprived of a procedure granted to her by law and the benefits which accompanied the protection thereby afforded: the opportunity to defend the evaluation critical of her performance. While the refusal to entertain the grievance was carried out under color of law, it has no justification or excuse. The refusal to entertain the grievance was illegal, improper and unfounded and, therefore, unrelated to any activity in which they may appropriately

and legally engage in the course of administering and directing the personnel affairs of the Dispensary.

29. Each of the individual Defendants assisted, acted and actively engaged in the course of conduct leading to the Plaintiff's termination, including the refusal to entertain the grievance. By so acting, each of the individual Defendants became a party to the injuries inflicted on the Plaintiff.

30. The Plaintiff's procedural due process interest in pursuing her grievance within the Dispensary free from the arbitrary, capricious and unreasonable denials, impositions and restraints imposed by the individual Defendants is well settled in state and federal law.

31. The Plaintiff's procedural due process interest in pursuing her grievance within the Dispensary was well settled in state law on April 4, 1993. The individual Defendants forfeited any qualified good faith immunity they might have enjoyed by engaging in a course of conduct directed at the Plaintiff which they knew or reasonably should have known was in violation of the Idaho Personnel Commission Act, Title 67, Chapter 53, Idaho Code: refusal to receive and address a grievance of a permanent, classified employee of the State of Idaho whose right to do so is protected by law.

DAMAGES

32. As a direct and proximate result of the acts and actions of the Defendants, the Plaintiff was deprived of her property right to her job for a considerable period of time, she lost the use of her earnings and interest on

those earnings, State paid benefits and other consideration for employment, additional expenses incurred as a result of the firing, lost opportunities for overtime work, and was subjected to fear, humiliation, embarrassment and degradation, mental and emotional anguish and distress, loss of reputation and self esteem.

33. The acts, actions and conduct of the individual Defendants in terminating the Plaintiff reflect conduct which was motivated by an evil motive or intent, or involves a reckless or callous indifference to the federally protected rights found in the individual Defendant's obligations arising out of Title 67, Chapter 53, and Title 39, Idaho Code. Punitive damages are necessary to punish and deter these individual Defendants and others similarly situated.

REQUEST FOR INJUNCTIVE RELIEF

34. The termination of the Plaintiff and the denial of her access to the grievance procedure established in law is contrary to the spirit and intent of the applicable statute, Title 67, Chapter 53, Idaho Code.

35. The Plaintiff requests the Court enter an Order forbidding the Dispensary from declining or refusing grievances from classified employees.

36. The Plaintiff requests the Court enter an Order forbidding the Dispensary from terminating permanent, classified employees without cause as required by statute.

37. The Plaintiff, having gained permanent status by operation of law, requests the Court enter an Order

reinstating her to her former position or one of like status and pay.

FEES AND COSTS

38. The Plaintiff has had to hire the undersigned attorneys. She has and will incur costs and expenses related to the prosecution of her claim and the protection of her rights and interests. Plaintiff is entitled to an award of the costs and attorney's fees reasonably and necessarily incurred, under 42 U.S.C. § 1988, I.R.C.P. 54, Idaho Code §12-117 and any other applicable law.

JURY TRIAL DEMAND

In accordance with I.R.C.P. 38 (b) a trial by jury on all issues so triable is demanded.

WHEREFORE, the Plaintiff prays:

1. The Court take jurisdiction over this action;

2. The Court allow the Plaintiff to amend this Complaint in light of information developed during discovery;

3. The Court find the Defendant liable for the causes of action alleged;

4. The Court order the Plaintiff reinstated to her former position or one of like status and pay;

5. The Court award the Plaintiff all such remedies as are afforded at law;

6. The Court award the Plaintiff her attorneys fees and costs incurred;

7. For such other and further relief as the Court may deem just and equitable in the premises.

DATED this 19th day of April, 1995.

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

KRISTINE L. FANKELL, Plaintiff, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY, Defendants.	)	Case No. CV-95-00529 **DEFENDANTS' MOTION TO DISMISS PURSUANT TO I.R.C.P. 12(b)(6) AND MOTION FOR AWARD OF ATTORNEYS' FEES** (Filed July 5, 1995)

Defendants Marian Johnson, Gordon Hubbard, Margo Edmiston, H. Dean Summers, and the Idaho State Liquor Dispensary (hereinafter the "State Defendants"),

by and through Nicole S. McKay, Deputy Attorney General, hereby move this Court to dismiss Plaintiff's Complaint pursuant to I.R.C.P. 12(b)(6) and move for an award of attorneys' fees pursuant to 42 U.S.C. § 1988. This motion is based upon the memorandum and upon the Affidavit of Margo Edmiston filed herewith.

DATED this 30th day of June, 1995.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Nicole S. McKay
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

KRISTINE L. FANKELL, Plaintiff, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY, Defendants.	Case No. CV-95-00529 **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO I.R.C.P. 12(b)(6) AND MOTION FOR AWARD OF ATTORNEYS' FEES** (Filed July 5, 1995)

Defendants Marian Johnson, Gordon Hubbard, Margo Edmiston, H. Dean Summers, and the Idaho State Liquor Dispensary (hereinafter the "State Defendants"),

by and through Nicole S. McKay, Deputy Attorney General, hereby file this memorandum in support of Defendants' Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6); Motion for Summary Judgment; and Motion for Award of Attorneys' Fees.

FACTS

Plaintiff Kristine L. Fankell received an appointment to a probationary position as a liquor store clerk with the Liquor Dispensary on August 2, 1992. Complaint, p. 5, ¶ 13. Plaintiff's job performance was evaluated as of March 13, 1993, as "below expectation." Complaint, p. 6, ¶ 17. As of March 13, 1993, Plaintiff had 950.90 hours of credited State service. *See* Attachment 1, Affidavit of Margo Edmiston. Plaintiff filed a grievance from the performance evaluation on April 2, 1993. Complaint, p. 6, ¶ 8. On April 7, 1993, Plaintiff was notified that because she had failed to satisfactorily complete her probationary period, she was being given the opportunity to resign without prejudice and, if she declined to resign, her employment with the Dispensary would be terminated effective April 22, 1993. Complaint, p. 6, ¶ 19. She did not resign, and her employment was terminated. Complaint, p. 6, ¶ 9.

The Complaint alleges two causes of action under 42 U.S.C. § 1983: (1) that the State Defendants deprived Plaintiff of the property interest she had in her employment with the Dispensary by terminating her without proper cause or adequate notice, and (2) that the State

Defendants deprived Plaintiff of due process by depriving her the opportunity to defend the performance evaluation critical of her job performance. Complaint, pp. 6-9, ¶¶ 21-31.

SUMMARY OF LEGAL ARGUMENT

1. The State Defendants move pursuant to Rule 12(b)(6) to dismiss all claims for damages under 42 U.S.C. § 1983 for failure to state a claim upon which relief may be granted because administrative procedures were available to Plaintiff that, had she utilized them, would have provided her due process of law with regard to contesting the termination of her employment.

2. The State Defendants who are officials sued in their personal capacities move pursuant to Rule 12(b)(6) to dismiss all claims for damages under 42 U.S.C. § 1983 for failure to state a claim upon which relief may be granted because the state officers are entitled to qualified immunity under 42 U.S.C. § 1983.

3. Defendant Idaho State Liquor Dispensary moves pursuant to Rule 12(b)(6) to dismiss all claims for injunctive relief under 42 U.S.C. § 1983 for failure to state a claim upon which relief may be granted because the state agency is not a "person" subject to suit under 42 U.S.C. § 1983.

4. The State Defendants should be awarded attorneys' fees under 42 U.S.C. § 1988.

I.

ALL CLAIMS AGAINST THE STATE DEFENDANTS FOR DAMAGES UNDER 42 U.S.C. § 1983 SHOULD BE DISMISSED UNDER RULE 12(b)(6) BECAUSE THE PLAINTIFF HAD AVAILABLE (BUT DID NOT TAKE ADVANTAGE OF) ADMINISTRATIVE PROCEDURES THAT WOULD HAVE PROVIDED HER DUE PROCESS OF LAW HAD SHE CHOSEN TO CONTEST TERMINATION OF HER EMPLOYMENT

A plaintiff in a section 1983 suit usually is not required to exhaust either state judicial or administrative remedies to bring suit alleging a denial of constitutional rights (*e.g.*, freedom of religion, right to interstate travel, etc.). However, when a plaintiff sues under the Fourteenth Amendment alleging that she has been "deprive[d] . . . of life, liberty or property, without due process of law," the alleged constitutional violation consists of two steps: (1) a deprivation of liberty or property (2) without due process of law. *Parratt v. Taylor*, 451 U.S. 527, 537, 101 S. Ct. 1908, 1913-14, 68 L. Ed. 2d 420 (1981). Accordingly, the analysis of the claimed deprivation of liberty or property without due process of law must examine whether there were administrative proceedings available to Plaintiff when her job was terminated.

The Ninth Circuit Court of Appeals has held that where an adequate "administrative remedy . . . was not designed to be remedial, . . . [but] [i]nstead, . . . provide[s] a means of forestalling a threatened future deprivation of civil rights," Plaintiff must run the procedural gauntlet. *Bingnall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976), citing *Ellis v. Dyson*, 421 U.S. 426,

432-33 (1975), and *Whitner v. Davis*, 410 F.2d 24, 28 (9th Cir. 1969).

In *Bingnall*, an Idaho college instructor and husband brought an action under 42 U.S.C. § 1983 claiming that North Idaho College had denied Mrs. Bingnall procedural and substantive due process when it declined to renew Mrs. Bingnall's teaching contract. The college afforded the Bingnalls a hearing, but the Bingnalls chose prematurely to withdraw from it and return to district court. The Ninth Circuit found that the Bingnalls were provided with adequate due process protection and, therefore, affirmed the district court's finding that Mrs. Bingnall had waived her right to further administrative due process by improperly terminating the hearing.

The Ninth Circuit reaffirmed *Bingnall* in *Correa v. Nampa School District No. 131*, 645 F.2d 814 (9th Cir. 1981). Ms. Correa brought an action under 42 U.S.C. § 1983 alleging that the school district deprived her of her constitutional rights when it did not renew her contract. The district court held that Ms. Correa had waived her right to claim a due process violation because she knowingly and voluntarily chose to forego the district's administrative procedures and, instead, pursued a claim through the Office of Civil Rights. The Ninth Circuit affirmed the district court's ruling, relying on the finding in *Bingnall* and finding that "where adequate administrative procedures exist, a person cannot state a claim for denial of procedural rights when he has elected to forego a complete hearing." 645 F.2d at 817, citing *Bingnall*, 538 F.2d at 247.

Similarly to *Bingnall* and *Correa*, in this case, Plaintiff had available to her adequate administrative remedies that she failed to utilize. The administrative remedies that were available to Plaintiff during her employment with the Liquor Dispensary are found in the Idaho Personnel System Act (PSA), which subjects all classified employees of the state to its prescribed system of personnel administration, including its grievance procedure. Idaho Code § 67-5303. Idaho Code § 65-5315 provides that any classified employee may grieve *any matter*, except for compensation and for termination during the entrance probationary period.

The PSA requires the Personnel Commission to adopt a uniform grievance procedure which must contain "time periods for each step of the procedure." Idaho Code § 67-5315(4)(a). The Personnel Commission has adopted a grievance procedure requiring classified employees to file written grievances "not later than five (5) working days after being notified of a grievable action or becoming aware of a grievable matter. . . . " IDAPA 28.20.A.2 (subsequently redesignated at IDAPA 28.01.01.200.02). These processes of law were all that were due Plaintiff and, when she did not take advantage of them, she cannot claim she lost her liberty or property interest in continued employment without due process of law.

A. Deprivation of Procedural Due Process Claim

Plaintiff claims that she was denied due process of law to contest the evaluation critical of her job performance because Defendants did not respond to her grievance and that this deprivation constitutes a violation of

her procedural due process rights. Complaint, p. 8, ¶ 28. In support of this claim, Plaintiff alleges that her job performance was evaluated on March 13, 1993. *Id.*, p. 6, ¶ 17. Plaintiff further alleges that she filed a grievance relating to the performance evaluation she had received on April 2, 1993, *id.*, p. 6, ¶ 18, and that Defendants refused to entertain the grievance. *Id.*, p. 8, ¶ 23.

At no time was Plaintiff denied an opportunity or process by which to defend the evaluation critical of her performance; in fact, she admits she utilized that process on April 2, 1993. *Id.*, p. 6, ¶ 18. However, Plaintiff failed to file the grievance within five working days of receiving notice that her employment had been terminated as is required by IDAPA 28.01.01.200.02. Plaintiff is attempting to turn her failure to *timely* file a grievance of the evaluation and Defendants' "refusal to entertain the grievance," *id.*, p. 8, ¶ 28, into a claim that Defendants deprived her of an opportunity or procedure to defend the evaluation. However characterized, though, Plaintiff's failure to utilize the available administrative procedures by filing a grievance within five (5) days of receiving the performance evaluation constitutes a waiver of her rights under the uniform grievance procedure, regardless of whether Defendants responded to her grievance, and her claims that Defendants violated her civil rights by depriving her procedural due process rights should be dismissed.

B. Deprivation of Substantive Due Process Claim

In support of Plaintiff's claim of deprivation of substantive due process, Plaintiff alleges that on April 7, 1993, she received written notice that in consideration of

her performance evaluation, she was being given the opportunity to resign or be terminated effective April 22, 1993. Complaint, p. 6, ¶ 19. Electing not to resign and thus having been terminated, Plaintiff further alleges that, having achieved permanent status by operation of law, she was terminated without cause assigned or adequate notice. *Id.*, p. 7, ¶ 23.

Assuming Plaintiff had achieved permanent status as is alleged in the Complaint, she was entitled to the full range of procedural rights as set forth by the PSA. Idaho Code § 67-5303. However, Plaintiff did not file a grievance relating to her termination. *See* Attachment 1, Affidavit of Margo Edmiston. Again, Plaintiff's failure to utilize the available administrative procedures by filing a grievance relating to her termination constitutes a wavier of her rights under the uniform grievance procedure and her claims that Defendants violated her civil rights by depriving her substantial due process rights should be dismissed.

II.

ALL CLAIMS FOR DAMAGES AGAINST THE STATE INDIVIDUAL DEFENDANTS UNDER 42 U.S.C. § 1983 SHOULD BE DISMISSED UNDER RULE 12(b)(6) BECAUSE THE STATE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Although state officers or employees may be sued in their individual or personal capacities, state officers sued in their personal capacities are frequently entitled to the defense of qualified immunity. *See Harlow v. Fitzgerald,*

457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).[1] In *Harlow v. Fitzgerald,* the U.S. Supreme Court explicitly eliminated the element of subjective good faith in establishing the current standard for qualified immunity and set forth a standard that is to be decided by the court, holding:

> [G]overnment officials performing discretionary function[s] are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

457 U.S. at 818.

The Court pointed out that the purpose of this objective standard was to resolve insubstantial claims prior to discovery. 457 U.S. at 813-18. The Court stated that the important public purpose of the qualified immunity doctrine is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by

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[1] *Harlow* was a suit against federal, not state, officials. But, the U.S. Supreme Court has recognized that the same qualified immunity rules apply in suits against state officers under 42 U.S.C. § 1983 and in suits against federal officers under *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971). *Davis v. Scherer,* 468 U.S. 183, 194, n.12 (1984). Accordingly, this brief will cite the law of qualified immunity that can be claimed by federal officials sued under the federal Constitution interchangeably with the law of immunity of state or local officials sued under 42 U.S.C. § 1983.

action taken 'with independence and without fear of consequences.' " 457 U.S. at 819 (quoting *Pierson v. Ray,* 386 U.S. 547, 554, 87 S. Ct. 1213, 1217, 18 L. Ed. 2d 288 (1967)).

In *Mitchell v. Forsyth,* 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), the Court emphasized that the qualified immunity defense provides "*immunity from suit* rather than a mere defense to liability." 472 U.S. at 526. Thus, it is an issue that should be decided by the court before discovery and an issue that will justify an interlocutory appeal if the motion for summary judgment is not granted. As *Mitchell* explained:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the action the defendant claims he took.

472 U.S. at 528.

The Supreme Court later broadened the scope of the qualified immunity defense somewhat in *Anderson v. Creighton,* 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The Court set forth the standard to be applied in determining whether the constitutional right was sufficiently clear, holding that "[t]he contours of the right

must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* The Court also explained that, "in light of preexisting law the unlawfulness must be apparent" for the public official to be liable. *Id.* These cases were summarized by the Idaho Supreme Court in *Arnzen v. State*, 123 Idaho 899, 854 P.2d 242 (1993).

Elder v. Holloway, ___ U.S. ___, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994), is a recent U.S. Supreme Court case holding that the issue of whether the law is "clearly established" is a question of law to be determined by the Court. As such, the courts are not limited to the authorities presented by the parties in making this determination. The Ninth Circuit Court of Appeals had held that it was the plaintiff's burden to identify the universe of law from which the court could determine whether the right allegedly violated was clearly established. The Court rejected this holding, since it is the court's duty to determine whether the law was clearly established.

The case is the latest expression of the legal principles to be applied. Some of the pertinent holdings in *Holloway* are the following:

> The doctrine of qualified immunity shields public officials like the respondents from damages actions unless their conduct was unreasonable in light of clearly established law. . . . *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

. . . .

> The central purpose of affording public officials qualified immunity from suit is to protect them "from undue interference with their duties and from potentially disabling threats of liability. *Harlow v. Fitzgerald, supra*, at 806.

114 S. Ct. at 1019, 1023 (partial citations omitted).

In *Arnzen v. State*, the Idaho Supreme Court, after reviewing *Harlow v. Fitzgerald; Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991); and *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986), provided that in order to determine whether a state official, in his individual capacity, is entitled to qualified immunity, three questions must be asked:

1. Was there a clearly established law;
2. Did [defendant's] conduct violate a clearly established right of [plaintiff's]; and
3. Was [defendant's] conduct reasonable?

123 Idaho at 904, 854 P.2d at 247.

The Complaint in this matter alleges two causes of action: (1) a violation of Plaintiff's substantive due process rights, and (2) a violation of Plaintiff's procedural due process rights. Complaint, pp. 6-9, ¶¶ 21-31. Each cause of action will be addressed separately.

A. Violation of Civil Rights: Substantive Due Process Claim

Plaintiff has alleged that, as a permanent employee, Defendants' termination of her employment without cause assigned or adequate notice violated her substantive due process rights. Complaint, p. 7, ¶ 23. However, Plaintiff's claim against Defendants should be dismissed because Defendants' conduct in terminating Plaintiff was reasonable under the clearly established law that Plaintiff was not yet a permanent employee and, as such, did not violate any right of Plaintiff.

1. Was There a Clearly Established Law?

At the time Plaintiff was terminated, the entrance probation period beyond which one become a permanent employee had been set by the Personnel Commission at "one thousand forty (1040) hours of credited state service." IDAPA 28.15.A.2.a. (Note that IDAPA 28.15.A.2.a subsequently has been redesignated at IDAPA 28.01.01.150.02.a.) In addition, the Personnel Commission had also set by rule that "should a probationary employee fail to service satisfactorily, the appointing authority shall no later than thirty (30) calendar days after the expiration of the probationary period provide the employee and the Personnel Commission a performance evaluation indicating unsatisfactory performance." IDAPA 28.15.C.1. (Note that IDAPA 28.15.C.1 subsequently has been redesignated at IDAPA 28.01.01.152.) Finally, the Personnel Commission had set by rule that an employee who fails to serve satisfactorily during the entrance probation shall first be given the

opportunity in writing to resign without prejudice, and an employee who fails to resign may be terminated without cause assigned and without the right to file a grievance or an appeal. IDAPA 28.15.C.2 (subsequently redesignated at IDAPA 28.01.01.152.02).

2. Did the Defendants' Conduct Violate a Clearly Established Right of Plaintiff's?

This prong of the qualified immunity analysis is a compound question: (1) did Plaintiff have a clearly established right; and (2) did Defendants violate it?

As a probationary employee under IDAPA 28.15.A.2.a and upon a finding that Plaintiff had failed to satisfactorily complete her probationary period, Plaintiff had the right to receive a performance evaluation indicating unsatisfactory performance and the, right to resign without prejudice or the employing agency could terminate her employment without cause assigned and without the right to file a grievance or an appeal. On March 13, 1993, Plaintiff received a performance evaluation indicating unsatisfactory performance and, on April 7, 1993, Defendants notified Plaintiff in writing that, because she had failed to satisfactorily complete her probation, she was being given the opportunity to resign without prejudice and, if she declined the opportunity to resign, her termination would become effective 15 calendar days from the date of the letter (April 22, 1993). Complaint, p. 6, ¶¶ 17, 19. Defendants provided Plaintiff each and every one of the rights she was entitled to as a probationary employee.

3. Was Defendants' Conduct Reasonable?

Relying upon Personnel Commission Rule 28.15.A.2.a setting the entrance period of probation at 1040 hours of credited state service and Rules 28.15.C.1 and 28.15.C.2 setting the procedure to be followed when terminating a probationary employee, Defendants' conduct in terminating Plaintiff's employment for failure to satisfactorily complete her probationary period based upon her performance evaluation and supporting documentation was that of a reasonably competent public official in 1993. On March 13, 1993, when Plaintiff was evaluated, she had 887.90 hours of credited state service, well within the 1040 hours that make up the entrance period of probation under the Personnel Commission rule. *See* Attachment 1, Affidavit of Margo Edmiston. In addition, when Plaintiff was notified that her evaluation rated her performance unsatisfactory and that her employment was to be terminated, she was given the opportunity to resign. Defendants' conduct in reliance of Personnel Commission rules at IDAPA 28.15.A.2.a, 28.15.C.1 and 28.15.C.2 in the termination of Plaintiff was reasonable.

Although the Personnel Commission rule was found in February of 1994 to have erroneously construed Idaho Code § 67-5309(I) (subsequently redesignated at Idaho Code § 67-5309(j)) in providing for a probationary period of 1040 hours in IDAPA 28.15.A.2.a, *Hood v. Idaho Det. of Health and Welfare*, 125 Idaho 151, 868 P.2d 479 (1994), Defendants reasonably believed, even though it was later determined to be erroneous under *Hood*, that the termination of Plaintiff's employment on April 7, 1993, for failure to satisfactorily complete her probationary period to be lawful in light of IDAPA 28.15.A.2.a. *See Hunter v. Bryant*,

502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (court deciding public officer's claim of qualified immunity should ask whether officers acted reasonably under settled law in circumstances, not whether another reasonable, or more reasonable, interpretation of events could be construed five years after the fact.)

B. Violation of Civil Rights: Procedural Due Process Claim

Plaintiff alleges in support of her procedural due process claim that Defendants' "refusal to entertain her greivance" deprived her of a procedure to defend her evaluation and, therefore, violated her procedural due process rights. Complaint, p. 8, ¶ 28. However, Plaintiff's claim against Defendants should be dismissed because Defendants' conduct in response to the grievance filed by Plaintiff was reasonable under clearly established law and thus did not violate the rights of Plaintiff.

1. Was There a Clearly Established Law?

At the time of Plaintiff's employment with the Dispensary on August 2, 1992, through April 22, 1993, Idaho Code § 67-5315 provided in part:

> (1) . . . A classified employee may grieve any matter, except that compensation shall not be deemed a proper subject for consideration under the grievance procedure except as it applies to alleged inequities with a particular agency or department, and except for termination during the entrance probationary period.
>
> . . . .

> (4) On or before July 1, 1987, the Idaho Personnel Commission shall adopt a rule defining a uniform grievance procedure for use . . . [by] all participating departments. . . .

Pursuant to Idaho Code 67-5315(4), the Idaho Personnel Commission defined at IDAPA 28.20.A.2 (now IDAPA 28.01.01.200.02) that "[a]ny classified employee with permanent, provision or entrance probation status may file a grievance as defined by section 67-5215(1), Idaho Code. An employee shall file a grievance in writing not later than five (5) working days after being notified of a grievable action or becoming aware of a grievable action. . . ."

2. Did Defendants' Conduct Violate a Clearly Established Right of Plaintiff's?

This prong of the qualified immunity analysis is a compound question: (1) did Plaintiff have a clearly established right; and (2) did Defendants violate it?

Pursuant to Idaho Code § 67-5315 and IDAPA 28.20.A.2, Plaintiff clearly had the right to file a grievance relating to the performance evaluation within five (5) working days of obtaining knowledge of the evaluation. Plaintiff was evaluated and signed the evaluation on March 13, 1993. *See* Attachment 1, Affidavit of Margo Edmiston; Complaint, p. 6, ¶ 17. Plaintiff had the right to file a grievance objecting to the contents of that evaluation up to and including March 19, 1993. However, Plaintiff failed to file a grievance within that time period; Plaintiff's grievance was not filed until April 2, 1993. Complaint, p. 6, ¶ 18.

Although Plaintiff alleges that she filed a grievance relating to the performance evaluation, *Id.*, p. 6, ¶ 18, Plaintiff alleges that Defendants deprived Plaintiff the opportunity to defend the evaluation critical of her performance because Defendants did not respond to the grievance. *Id.*, p. 8, ¶ 28. However, by Plaintiff's own admission, Plaintiff was not deprived of the process due her to defend her evaluation; she had a right to exercise, but she did not *timely* exercise her right. Plaintiff's failure to timely file a grievance does not constitute a violation of Plaintiff's procedural due process rights by Defendants.

3. Was Defendants' Conduct Reasonable?

Because Plaintiff's grievance of her job performance evaluation was not timely filed, Defendant was under no obligation to respond to it. Defendant's actions were not only reasonable, but they were entirely lawful under the laws and rules of the Personnel Commission.

III.

ALL CLAIMS AGAINST DEFENDANT STATE LIQUOR DISPENSARY UNDER 42 U.S.C. § 1983 SHOULD BE DISMISSED UNDER RULE 12(b)(6) BECAUSE THE STATE AGENCY IS NOT A "PERSON" SUBJECT TO SUIT WITHIN THE MEANING OF 42 U.S.C. § 1983

Plaintiff has alleged Defendants deprived her of procedural and substantive due process in violation of 42 U.S.C. § 1983. This statute, a section of the Civil Rights Act of 1871, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Plaintiff alleges that "the Defendant, the Idaho State Liquor Dispensary (Dispensary), is an entity of the State of Idaho, created and operating pursuant to Title 23, Chapter 2, Idaho Code" and "is sued for injunctive relief." Complaint, p. 4, ¶ 9.

The United States Supreme Court has ruled that states and state agencies are not "persons" within the meaning of 42 U.S.C. § 1983, *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), regardless of the relief sought, be it injunctive or legal (damages). The Idaho Supreme Court, in *Arnzen v. State*, 123 Idaho 899, 854 P.2d 242 (1993), concluded: "Thus, it is clear that, in Idaho, the State, for purposes of 42 U.S.C. § 1983, is not a 'person'." 123 Idaho at 903-04, 854 P.2d at 246-47. Both state and federal precedent is clear that the State Liquor Dispensary, as a state agency, must be dismissed from Plaintiff's suit.

IV.

THE STATE DEFENDANTS SHOULD BE AWARDED ATTORNEYS' FEES UNDER 42 U.S.C. § 1988

42 U.S.C. § 1988 is the attorneys' fees statute associated with suits brought under 42 U.S.C. § 1983. In relevant part it provides: "In any action or proceeding to enforce [42 U.S.C. § 1983] the court, in its discretion, may allow the prevailing party . . . a reasonable attorneys' fee as part of the costs." Although the language of this statute is neutral between prevailing plaintiffs and prevailing defendants, the statute has been interpreted to allow awards to prevailing defendants only when the plaintiff's underlying claim is "frivolous, unreasonable or groundless." *Roadway Express, Inc. v. Piper*, 447 U.S. 753, 762, 100 S. Ct. 2455, 2461, 65 L. Ed. 2d 488 (1980). The Ninth Circuit has upheld the award of attorneys' fees to prevailing defendants, *Maag v. Wessler*, 944 F.2d 654 (9th Cir. 1991); *Patton v. County of Kings*, 857 F.2d 1379 (9th Cir. 1988), so has our neighboring state of Washington, *Meyer v. University of Washington*, 719 P.2d 98 (Wash. 1986). Attorneys' fees should be awarded to the State Defendants because they should prevail as a matter of law on the basis of absolute or qualified immunity, and a complaint that cannot overcome a Rule 12(b)(6) motion is unreasonable and groundless.

DATED this 30th day of June, 1995.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Nicole S. McKay
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(Certificate Of Service And
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

Kristine L. Fankell, **Plaintiff,** **vs.** **Marian Johnson, Gordon Hubbard, Margo Edmiston, H. Dean Summers, each of them individually, and the Idaho State Liquor Dispensary,** **Defendants.**	**Case No. CV-95-00529** **Plaintiff's Response to Defendants' Motion to Dismiss** (Filed Dec. 1, 1995)

The Plaintiff sued the Defendants for the termination of her employment with the State of Idaho stating they had deprived her of her substantive and procedural due process rights. The defendants reply they cannot be sued

under their analysis of the facts and move to dismiss under IRCP 12(b)(6).

Standard of Review

A 12(b)(6) motion is, effectively, a motion for summary judgment, with its attendant, well known standards. *ID Schs. for Equal Educ. Opportunity v. Evans,* 123 ID 598 (1993), *Miles v. Idaho Power Co.,* 116 ID 635 (1989). Every reasonable intendment to sustaining the complaint must be made. *Harper v. Harper,* 122 ID 535 (App. 1992) The plaintiff is entitled to have all inferences from the record viewed in her favor, and only then may the question be raised as to whether a claim for relief has been stated. *Id., ID Schs., supra; Miles, supra.* However, there appears to be no requirement that the motion's proceedings parallel IRCP 56(c).

Facts before the Court

There are but three slim sources of facts before the Court on this Motion: those contained in the verified Complaint (as amended), the Plaintiff's supplemental Affidavit and the Edmiston Affidavit. These sources reveal the following chronology:

6.10.80	Fankell first employed by ISLD (Comp., ¶9)
8.2.92	Fankell probationary appointment as Liquor Store Stock Clerk (Comp., ¶12; Edmiston Affidavit (hereafter Edmiston) ¶2)
2.2.93	Six month anniversary of initial employment. IRE 201,

I. C. §73-114(4)

1.11.93-3.10.93	Fankell acts a Store Manager for Store #322 (Comp., ¶13)
3.25.95	Defendant Johnson signs Plaintiff "below expectation" performance evaluation for period ending March 13, 1993. (Comp., ¶16; Edmiston, ¶3)
3.30.95	Plaintiff receives performance evaluation. (Fankell Affidavit, hereafter Fankell, ¶___.
4.2.93	Plaintiff grieves performance evaluation, receives no response. (Comp., ¶17)
4.7.95	Defendant Summers notifies Plaintiff will be terminated for failure to complete initial probationary period. (Comp., ¶18; Edmiston, ¶6)
4.22.93	Plaintiff terminated. Comp., ¶18; Edmiston,¶7)

ARGUMENT

The premise offered by the State is simple enough: there is no set of facts from which relief may arise: this Plaintiff was deprived of neither procedural nor substantive due process, all named defendants are immune in any event. The Plaintiff was obliged to exhaust her administrative remedies before filing this action. She has no process due her because she did not timely file a grievance regarding her March 13, 1993 (date of end of evaluation period) performance evaluation. Apparently as a result of this failure, she could lose no property right.

As the law on the time frame for the filing grievances was clearly established on the date of her termination, the Defendants are entitled to a qualified immunity.

Omitted from the Defendant's argument is the controlling law and/or the facts necessary to dismiss the claim.

The Plaintiff is not required to exhaust her administrative remedies.

Citing cases decided in 1976 (*Bignall v. North Idaho College*, 538 F2d 243 (9th Cir.) and 1981 (*Correa v. Nampa Sch. Dist No. 131*, 645 F2d 814 (9th Cir.), the Defendant omits the dispositive case: *Patsy v. Bd. of Regents*, 457 US 496 (1982). There the Supreme Court held: "that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." (*Id.* @516) While *Patsy* was a federal court action, the Court in *Felder v. Casey* (487 US 131 (1988)) clearly held that *Patsy's* no exhaustion of state administrative remedies was fully applicable to the claim here: a state court § 1983 action.

The Defendants properly notes the Idaho Personnel Commission (IPC), pursuant to the legislature's dictate (I.C §67-5315(1)), adopted a grievance procedure for all departments (with specific timeframes for action). The Defendants then argue the Plaintiff did not file her grievance in a timely fashion, precluding this Court's review. However, to do so, they invite the Court to guess that a performance evaluation with an ending date of March 13, signed by the reviewing supervisor on March 25 was not timely when it was filed on April 2. Again, properly

noted, the filing requirement runs from "five (5) working days after being notified of a grievable action or becoming aware of a grievable action . . . " IDAPA 28.20.A.2. [The revision of the IDAPA citation scheme and the IPC's revision of the statutes relating to grievances and appeals occurred after the termination of the Plaintiff. Citations herein refer to those applicable at the time of her termination, April 22, 1993.]

As stated in the Affidavit of the Plaintiff, she received the evaluation on or about March 30, 1993 and filed her grievance shortly after being notified, April 2. The omission of the date the State asserts was the day of the notice to the Plaintiff fatally undercuts its assertion the grievance was not timely filed. (Assuming solely for argument the filing was even required.) Summary judgment is precluded on this point alone: the uncontested material facts demonstrate a timely filing.

While failure to grieve does constitute a waiver of the right of IPC review (I. C. §67-5315(3)), there is no basis in fact to the Defendant's claim of waiver. The only response, if it can be so denominated, was the April 7, 1993 notice of failure to perform satisfactorily during the probationary period. The Plaintiff believes she was terminated *not* for unsatisfactory performance but for her objection about who should manage the store to which she was assigned during the Johnson absence. A probationary employee does have the right, and the employer a duty, to a performance evaluation. *Brigham v. Dept. of Health and Welfare*, 106 ID 347 (1984). It would appear beyond cavil that the evaluation relied upon for the assertion of purportedly poor performance would be correctly calculated. The failure of the Defendants to even assert

what day the Plaintiff was put on notice of her purportedly poor performance dictates the denial of summary judgment.

As to the claim the Plaintiff cannot assert a claim for the deprivation of substantive due process (her property right in her employ by the State), by virtue of an asserted failure to timely file a grievance (presumably a failure to exhaust administrative remedies argument), the above analysis dictates it, too, must fail.

The movant is required to furnish this Court with uncontested material facts sufficient, in the light of the applicable law, to support a determination the Plaintiff fails to state a claim (or, perhaps more properly, is owed judgment as a matter of law). Failure to clearly demonstrate by affidavit an untimely filing precludes summary judgment on this point.

Most importantly, however, is the fundamental proposition that exhaustion of administrative (and state judicial) remedies is *not* required before filing the action.

The Defendants are not entitled to qualified immunity: termination without cause of an employee made permanent by operation of law deprives her of her property interest in employment.

The Defendants are not immune from this suit. On the day of her termination the Plaintiff had already achieved permanent status by operation of law.

First, it was clearly established on April 22, 1993, that permanent classified state employees enjoyed and possessed a property interest in their employment. *Cf. Harkness v. City of Burley,* 110 ID 353 (1986); *Cleveland Bd. of Education v. Loudermill,* 470 US 532 (1985); I. C. § 67-5309(m) [no termination without cause] with *Tiffany v. City of Payette,* 121 ID 396 (1992) and *Arnzen v. Richardson,* 123 ID 899 (1993).

Second, the Defendant's reliance on an incorrect IPC regulatory interpretation does not make the applicable federal constitutional law unclear.

Third, the decision to terminate based on the purportedly poor performance was manifestly wrong on its face: the addition of the points, resulting in a 'below expectation' rating was incorrect. The Plaintiff had sufficient points to achieve a 'meets expectation' rating.

The failure to entertain the grievance on her performance evaluation, which she had a right to file, that apparently precipitated her termination deprived her of the process which she was due: access to the grievance procedure itself.

The procedural due process claim.

The Plaintiff received her performance evaluation from Defendant Johnson on March 30, 1993 (Fankell, ¶___). She filed a grievance about her 'below expectation' performance evaluation on April 2, 1993. Amndd. Comp. ¶18, Edmiston, ¶5. The Defendant's did not reply. Amndd. Comp. ¶18. The Plaintiff clearly had a right to file and pursue a grievance about her performance under I. C. §67-5315(1) and IDAPA 28.20.A.2. The Defendants,

responsible for processing the grievance through its levels of management, necessarily had a duty to respond. IDAPA 28.20.A.3. [Plaintiff notes at this early stage in the proceedings the actual grievance procedure at issue is not before the Court.]

Under I. C. §67-5315 the Plaintiff clearly had a right to file and pursue a grievance.

In accordance with this statute, the Dispensary, her employer, obviously violated a clearly established right when no action was taken on her grievance.

The failure to address the timely filed grievance demonstrates the Dispensary and its agents, the named Defendants, was patently unreasonable. Indeed, it appears the sole response to the filing of the grievance was the notice she would be terminated for unsatisfactorily performance during the probationary period based on the incorrectly added evaluation points.

The Plaintiff's right of access to the grievance procedure, owed to her as a matter of law, was clearly violated by the Dispensary and its agents because of their inaction. The Plaintiff suffered a deprivation of the procedural due process owed to her. The Dispensary and its agents were required to process the grievance, did not and, thusly, violated her rights.

Summary judgment on this point must be denied: the factual basis for the motion is inadequate to support a ruling in favor of the Defendants.

The substantive due process claim.

As noted earlier, the law regarding a permanent employee's property interest in her employment was well

established on the date of her termination. The Defendants can take no solace in the subsequent *Hood v. Health & Welfare*, 125 ID 151, (1994) as a shield from liability – the Idaho Supreme Court decision that the passage of time, pursuant to law and not under the incorrect IPC interpretation, made Hood a permanent employee is equally applicable to the Plaintiff Fankell.

While the decision in *Hood* followed the termination, the Defendants "cannot use the absence of case law directly on point to shield them from liability. The unlawfulness of their conduct should have been apparent to them in light of preexisting case law." *Ostlund v. Bobb*, 825 F2d 1371 @1374, (1988). In *Ostlund*, the decision on point was not rendered by the state court until three years after the filing of the federal complaint in the case.

As initially noted in *Board of Regents v. Roth*, 408 US 564 (1972), "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlements to those benefits." *Id.* @577. The law on transforming probationary employees into permanent ones, in light of the failure of the appointing authority to evaluate the employee within 30 days of the conclusion of the six month probationary period, went into effect on July 1, 1987, the effective date of the adoption of the amendments to I. C. §67-5309(i). (87 ID Sess. L., Ch. 99, p. 194) The law relating to the Plaintiff's permanent status was clearly established approximately four (4) *years* before her hire as a probationary employee.

In *Arnzen, supra,* the Court bifurcated the query respecting the violation of a clearly established right. As noted above, the law in effect before her hire established a finite probationary period and dictated failure to evaluate an employee within 30 days of the end of the period made the employee permanent. The termination of a permanent employee without notice or cause as required by I. C. §67-5309(m) and *Loudermill, supra,* obviously violates her established rights, irrespective of the Commission's erroneous interpretation upon which the Defendants rely for their motion.

As stated in Arnzen, *id.* @906: "We hold that the law was clearly established in 1989 that Arnzen, as a "classified" and "permanent" employee of the State, had a property interest in continued employment. Therefore, Richardson, in terminating Arnzen without due process, did not act as a reasonably competent public official in Idaho in 1989." This termination of a permanent by operation of law employee in 1993 is subject to the same analysis and rule. The Defendants did not act reasonably in light of the established law, irrespective of the Commission's erroneous interpretation.

The request for injunctive relief.

A review of the Amended Complaint reveals a request for injunctive relief to be entered against the State agency for the equitable relief of reinstatement and prospective prohibition of refusing grievances and termination of permanent employees without cause. The Defendant correctly notes both state and federal precedent prohibit suit against the State (or its entities) and it is not defined as a "person" for § 1983 purposes.

As stated by Schwartz and Kirklin, "The Eleventh Amendment decisional law is subtle and complex. It draws important dichotomies between municipal and state liability, between state law claims and federal claims, and between retrospective and prospective relief. Prospective relief is available against a state official sued in an official capacity. [Citing *Will v. Michigan Dept. of State Police,* 491 US 58 (1989)]." *Section 1983 Litigation, Claims, Defenses and Fees,* 2nd Ed., Schwartz & Kirklin, Wiley Law Pub., 1991, @ pps. 439-440. The sole purpose of the claims against the improperly named Dispensary being injunctive, the Plaintiff will consent to the dismissal of the Dispensary from the action if leave to amend is granted to name the Superintendent of the Dispensary in his official capacity.

This action is not frivolous.

Offering no rationale for the award of attorneys fees in its favor except for the bare assertion the case is frivolous, unreasonable or groundless, the Defendants request an award of fees for the response to the Motion. [Note may be made that the file, from the perspective of the Defendant's work, consists solely of the pending Motion, its Notice of Hearing and the Edmiston Affidavit.]

The standard for the award of fees under 42 USC 1988 is an amalgam of the rules of *Hughes v. Rowe* (449 US 5 (1980)) and *Christiansburg Garment Co. v. EEOC* (434 US 412 (1978)). Under the standard, the "fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees." *Hughes, supra,* @14.

The sole support of the award of fees to the Defendants is the last sentence of their brief: "Attorneys' fees should be awarded to the State Defendants because the should prevail as a matter of law on the basis of absolute or qualified immunity, and a complaint that cannot overcome a Rule 12(b)(6) motion is unreasonable and groundless." Defendant's Memo in Support of Motion, p. 15. Plaintiff notes the State's claim of absolute immunity, discussed nowhere in the previous 14 pages, first arises in the last sentence of the brief. The assertion a fee award should be based on an unmentioned, unbriefed and unasserted claim, patently inapplicable to this factual setting, is not well grounded.

The assertion the Complaint cannot withstand the motion is premature. No discovery to flesh out the Complaint has been conducted, no facts sufficient to support the claim of the Plaintiff's failure to timely file her grievance were furnished to the Court to provide it with the factual basis for a ruling in favor of the Defendants on a point omitting the applicable Supreme Court holdings.

The fee request should be denied in all respects.

CONCLUSION

There is simply no requirement the Plaintiff exhaust her state administrative remedies before filing suit. The law determining permanent, classified state employees have a property interest in their employment was established before the Plaintiff even applied for a permanent position. Where the Idaho Supreme Court has found the IPC has interpreted its statutory charter incorrectly after

the termination of the Plaintiff, qualified immunity cannot protect the Defendants from suit – the question is not the Commission's interpretation of the statute, but the existence of a property interest in employment on the date of the termination. Plaintiff seeks leave to amend the Complaint to bring suit against the Superintendent in his official capacity for the purpose of requiring him (and his successors) to comply with applicable law regarding accepting and responding to grievances. The Defendants request for fees should be denied, this case is not frivolous.

DATED this 30th day of November, 1995,

and respectfully submitted
on behalf of the Plaintiff,
Kristine Fankell, by

/s/ W. B. Latta, Jr.
W. B. Latta, Jr.,
one of her counsel.

(Certificate Of Service And
Attached Affidavit Omitted In Printing)

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**IN THE DISTRICT COURT OF
THE FIRST JUDICIAL DISTRICT STATE OF IDAHO,
IN AND FOR THE COUNTY OF BONNER**

KRISTINE L. FANKELL, Plaintiff, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY, Defendants.	)	Case No. CV-95-00529 **DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS** (Filed Dec. 21, 1995)

COME NOW Defendants, by and through Nicole S. McKay, Deputy Attorney General, and hereby file this Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss.

FACTS

The facts relied upon in Defendants' Motion for Summary Judgment are uncontested by the Plaintiff. Those facts are as follows:

Plaintiff Kristine L. Fankell received an appointment to a probationary position as a liquor store clerk with the Liquor Dispensary on August 2, 1992. Complaint, p. 5, ¶ 13. Plaintiff's job performance was evaluated as of March 13, 1993, as "below expectation." Complaint, p. 6, ¶ 17. As of March 13, 1993, Plaintiff had 950.90 hours of credited State service. *See* Attachment 1, Affidavit of Margo Edmiston. Plaintiff filed a grievance from the performance evaluation on April 2, 1993. Complaint, p. 6, ¶ 8. On April 7, 1993, Plaintiff was notified that because she had failed to satisfactorily complete her probationary period, she was being given the opportunity to resign without prejudice and, if she declined to resign, her employment with the Dispensary would be terminated effective April 22, 1993. Complaint, p. 6, ¶ 19. She did not resign, and her employment was terminated. Complaint, p. 6, ¶ 9.

I.

ADMINISTRATIVE PROCEDURES WERE AVAILABLE TO PLAINTIFF THAT, HAD SHE UTILIZED THEM, WOULD HAVE PROVIDED HER DUE PROCESS OF LAW WITH REGARD TO CONTESTING THE TERMINATION OF HER EMPLOYMENT

Defendants acknowledged that a plaintiff in a section 1983 case is not required to exhaust either state judicial or administrative remedies to bring suit alleging a denial of

constitutional rights. For example, a plaintiff is not procedurally barred from filing suit under 42 U.S.C. § 1983 for failure to file a state tort claim. However, when a plaintiff sues under the Fourteenth Amendment alleging deprivation of property without due process of law and the plaintiff had available administrative remedies that would have provided her due process of law had she utilized them, Plaintiff's claims should be dismissed on the merits because she has not been deprived of property without due process of law. In other words, when the plaintiff has alleged deprivation of a property interest without due process of law, as the basis for her suit under 42 U.S.C. § 1983, her failure to avail herself of administrative procedures available to her is fatal on the merits when she claims deprivation of property without due process of law.

Plaintiff cites two cases in opposition to Defendants' Motion to Dismiss, neither of which allege a Fourteenth Amendment deprivation of property without due process of law.

The first case Plaintiff cites to is *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 83 L. Ed. 2d 172, 102 S. Ct. 2557 (1982). *Patsy* is a section 1983 action in which the plaintiff alleged that the plaintiff's employer had denied her employment opportunities on the bases [sic] of her race and sex. *Patsy* is a Fourteenth Amendment equal protection claim, not a due process claim, and thus, the Court's holding that the plaintiff in *Patsy* did not have to exhaust administrative remedies prior to bringing a section 1983 claim applies to this case only in so far as that decision holds that failure to avail oneself of state administrative procedures is not a procedural bar to filing suit

under 42 U.S.C. § 1983. *Patsy* does not, however, address whether failure to avail oneself of available administrative procedures can and should result in a loss on the merits in a claim for deprivation of property without due process of law.

The second case Plaintiff cites to is *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). In *Felder* the petitioner brought a state court action against the city and certain officers under 42 U.S.C. § 1983 alleging that the beating he suffered from the officers and his subsequent arrest was unprovoked, racially motivated and violated his rights under the Fourth and Fourteenth Amendments. The Supreme Court overruled the Wisconsin Supreme Court's holding that the Wisconsin notice-of-claim statute applies to federal civil rights actions brought in state court.

Like *Patsy*, the *Felder* case is distinguishable from the instant case in several respects. One, the *Felder* case is not a Fourteenth Amendment due process claim, as is the instant case; and two, the *Felder* case holds that a plaintiff does not have to comply with the state notice-of-claim statute. Defendants are not contending that the Plaintiff in the instant case was required to comply with the Idaho State Tort Claims Act before filing this section 1983 claim. Defendants are contending that the Plaintiff had administrative remedies available to her that would have provided her due process had she utilized them, which the *Felder* case does not address.

The cases cited by Defendant in Defendants' Motion to Dismiss are directly on point and support Defendants' Motion to Dismiss. In *Bignall v. North Idaho College*, 538

F.2d 243 (9th Cir. 1976), citing *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975), the Ninth Circuit Court of Appeals held that where adequate "administrative remedy . . . was not designed to be remedial, . . . [but] [i]nstead, . . . provide a means of forestalling a threatened future deprivation of civil rights," a plaintiff must run the procedural gauntlet. As stated in Defendant's Motion to Dismiss, the court in *Bignall* found that, because the college afforded the Bignalls a hearing, although the Bignalls chose prematurely to withdraw from it, Mrs. Bignall had waived her right to further administrative due process by improperly terminating the hearing.

The second case cited in Defendants' Motion to Dismiss, *Correa v. Nampa School District No. 131*, 645 F.2d 814 (9th Cir. 1981), held that the plaintiff had waived her right to claim a due process violation because she knowingly and voluntarily chose to forego the district's administrative procedures and, instead, pursued a claim through the Office of Civil Rights.

Bingnall [sic] and *Correa* both hold that a plaintiff cannot maintain a section 1983 action for deprivation of due process where adequate administrative procedures existed and the plaintiff chose to forego those procedures that would have afforded the plaintiff due process of law. It follows, under *Bingnall* [sic] and *Correa*, that Plaintiff's case in the instant action should be dismissed because she elected to forego administrative procedures that would have provided her due process had she elected to utilize them.

A. Substantive Due Process Claim

Plaintiff does not specifically respond to Defendants' Motion to Dismiss on her substantive due process claim on the grounds that Plaintiff failed to avail herself to the administrative due process remedies available, other than to state that analysis referred to generally in his brief dictate that the defense must fail. Therefore, Defendants refer this Court the legal argument provided in Defendants' Motion to Dismiss and the analysis above in deciding this issue.

B. Procedural Due Process Claim

In support of Defendants' Motion for Summary Judgment specifically on Plaintiff's procedural due process claim, Defendants argued that Plaintiff failed to file her grievance objecting to her performance evaluation within five (5) working days of receiving notice of the evaluation. Defendants' motion was based upon information available at the time the motion was filed and upon the understanding that the performance evaluation was given to Plaintiff on March 25, 1993, the date the evaluation is signed. *See* Exhibit 1. However, upon receipt of Plaintiff's Affidavit, attached to Plaintiff's Response to Defendants' Motion to Dismiss, which stated that she received the performance evaluation on March 30, 1993, Defendants' counsel was able to confirm that Plaintiff did in fact receive the evaluation on March 30, 1993. As such, Defendants concede that Plaintiff filed her grievance of her performance evaluation within five (5) days of the receipt of the evaluation.

However, even assuming for purposes of argument that Plaintiff was deprived of procedural grievance rights under state law when no response to her grievance was received, she did not suffer a deprivation of property without due process of law because Plaintiff, as a probationary employee, could be terminated without any cause assigned during her probationary period and therefore had no property interest that was lost when there was no grievance hearing. IDAPA 28.01.01.152.02.a. As such, even if the Defendants had responded to Plaintiff's grievance of her evaluation, Defendants still could have terminated Plaintiff without cause assigned, as was done.

II.

THE STATE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY UNDER 42 U.S.C. § 1983

In response to Defendants' Motion to Dismiss on the grounds of qualified immunity, Plaintiff attempts to add a new claim to her complaint through her Response Brief, that "the decision to terminate based on the purportedly poor performance was manifestly wrong on its face: the addition of the points, resulting in a 'below expectation' rating was incorrect." Plaintiff's new allegation is not relevant to either of the two causes of action cited in the First Amended Complaint and should be stricken from the record.

A. Substantive Due Process Claim

Defendants' Memorandum in Support of its Motion to Dismiss sets forth in detail the legal principles of qualified immunity and the three prong test utilized to

determine whether a state official sued in his personal capacity is entitled to qualified immunity. *See Arnzen v. State*, 123 Idaho 899, 854 P.2d 242 (1993).

Plaintiff's objection to Defendants' claim of qualified immunity appears to be based upon the first prong of the three-part *Arnzen* test: "Was there a clearly established law?" Plaintiff contends that because "[o]n April 22, 1993, permanent classified employees enjoyed and possessed a property interest in their employment," Defendants are not entitled to qualified immunity. Plaintiff's Response, p.7. However, what Plaintiff fails to recognize is the state Personnel Commission rule in existence in 1993 provided that the entrance probationary period, beyond which one became a permanent employee, had been set by the Personnel Commission at "one thousand forty (1040) hours of credited state service." IDAPA 28.15.A.2.a. (redesignated at IDAPA 28.01.01.150.02.a.).

Under the Personnel Commission rule setting the probationary period at 1,040 hours of credited state service, Plaintiff was still a probationary employee at the time of her evaluation and termination. Furthermore, as a probationary employee, Plaintiff did not have a property right in her employment. *See Hansen v. White*, 114 Idaho 907, 912, 762 P.2d 820, 825 (1988) (an employee during the probationary period may be terminated without cause); *Arnzen v. State*, 123 Idaho 899, 904, 854 P.2d 242, 247 (1993) (in order for an employee to have a property interest in continued employment, he must have been more than an employee at will). *See also McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (Supreme Court has not extended substantive due process protection to areas in which substantive rights are created only by state law,

such as employment law, because substantive due process rights are created only by the Constitution, citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S. Ct. 507, 515 (1985)).

Plaintiff also contends that Defendants can "take no solace" in the *Hood v. Idaho Department of Health and Welfare*, 125 Idaho 151, 868 P.2d 479 (1994), decision, which overturned the 1040-rule as inconsistent with the underlying statute's six-month mandate, "as a shield from liability." However, Plaintiff's argument is without merit. the Supreme Court in *Hood* specifically stated:

> Although we have concluded that the commission acted outside its authority by setting the probationary period at 1,040 hours of credited state service, we conclude that *the department did not act unreasonably in following the commission's invalid rule* and relying on the commission's decision.

125 Idaho at 154; 868 P.2d at 482 (emphasis added).

As Defendants noted in their Memorandum in Support of their Motion to Dismiss, the third prong of the *Arnzen* test is, "Was Defendant's conduct reasonable?" The Idaho Supreme Court, when addressing this very issue, found in *Hood* that the "department did not act unreasonably in following the commission's invalid rule." Thus, in the instant case, it follows that Defendants' conduct was reasonable in following the Personnel Commission's rule defining the probationary period at 1,040 hours of credited state service. As the Supreme Court of the United States explained in *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991), defendants are entitled to qualified immunity if their

decisions were reasonable, even if later shown to be mistaken. 502 U.S. at 228-29, 112 S. Ct. at 536-37. *See also Anderson v. Creighton*, 483 U.S. 635, 638-41, 107 S. Ct. 3034, 3038-40, 97 L. Ed. 2d 523 (1987).

Under the *Arnzen* three-prong analysis, state officers are entitled to the defense of qualified immunity if: (1) there was [not] a clearly established law to the contrary; (2) the defendant's conduct did not violate a clearly established right of plaintiffs; and (3) the defendant's conduct was reasonable. 123 Idaho at 904, 854 P.2d at 247. Defendants in the instant case have shown: (1) in 1993 the probationary period set by Personnel Commission rule was 1,040 hours of credited state service; (2) that at the time Plaintiff was evaluated, she had 950.90 hours of credited state service and Plaintiff was provided each and every one of the rights she was entitled to with regards to termination as a probationary employee; and (3) that Defendants' conduct in terminating Plaintiff according to this rule governing probationary employees was reasonable. Defendants have satisfied the three-prong test of *Arnzen* and, therefore, are entitled to the defense of qualified immunity. Plaintiff's lawsuit should be dismissed.

B. Procedural Due Process Claim

As stated above, Defendants acknowledge that Plaintiff filed a grievance of her performance evaluation within five (5) days receipt of the evaluation. However, even assuming that clearly established law in 1993 allowed Plaintiff to file a grievance of her performance evaluation, Defendant's conduct in not responding to her grievance did not violate a property right protected

under federal law because as a probationary employee, Plaintiff had no property right in her employment. *See Hansen v. White*, 114 Idaho 907, 912, 762 P.2d 820, 825 (1988) (an employee during the probationary period may be terminated without cause); *Arnzen v. State*, 123 Idaho 899, 904, 854 P.2d 242, 247 (1993) (in order for an employee to have a property interest in continued employment, he must have been more than an employee at will). *See also McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (Supreme Court has not extended substantive due process protection to areas in which substantive rights are created only by state law, such as employment law, because substantive due process rights are created only by the Constitution, citing *Regents of Univ. of Mich. v Ewing*, 474 U.S. 214, 229, 106 S. Ct. 507, 515 (1985)). For example, although a probationary employee may grieve that the employee does not like the furniture or the color of the walls in her office, that employee does not have a property right in office decor. Similarly, in the instant case, because Plaintiff was a probationary employee, she had no property right in her employment and therefore, the Defendants, in not responding to her grievance, did not violate a "clearly established right" of Plaintiffs.

Under the *Arnzen* analysis, the Defendants are entitled to the defense of qualified immunity on Plaintiff's procedural due process clause because even under the clearly established law allowing probationary employees to file grievances, the Defendants conduct in not responding to the grievance did not deprive her of property without due process of law.

III.

THE IDAHO STATE LIQUOR DISPENSARY IS NOT A "PERSON" SUBJECT TO SUIT UNDER 42 U.S.C. § 1983

Plaintiff acknowledges in her Response to Defendants' Motion to Dismiss that both state and federal precedent prohibit suit against the state (or its entities) and is not defined as a "person" for section 1983 purposes. Plaintiff further consents to the dismissal of the Dispensary from the action. However, Plaintiff conditions her consent for such dismissal on this Court's agreement to grant Plaintiff leave to amend the Complaint to name the Superintendent of the Dispensary in his official capacity.

Because both state and federal law is clear that suit against the state or its entities is prohibited under a section 1983 claim, the Idaho State Liquor Dispensary should be dismissed from this suit regardless of whether this Court grants Plaintiff leave to amend her complaint. Because Plaintiff's request for leave to amend the complaint is not properly before the Court at this time, Defendants reserve all objections to such an amendment.

DATED this 18 day of December, 1995.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Nicole S. McKay
Nicole S. McKay
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(Certificate Of Service Omitted In Printing)

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IN THE DISTRICT COURT OF
THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BONNER

KRISTINE L. FANKELL,

PLAINTIFF,

VS.

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY,

DEFENDANTS

CASE NUMBER:
CV95-00529

ORDER

(Filed
Feb. 23, 1996)

Pursuant to Defendant's Motion to Dismiss previously filed herein, this matter came on for hearing on the 13th day of February, 1996, wherein the Plaintiff appearing by and through her Attorney of Record, James A. Raeon, and the Defendant appearing by and through its

Attorney of Record, Nicole McKay, Deputy Attorney General, and after a review of the record and files herein, the Motions and Briefs submitted in Support thereof;

NOW, THEREFORE,

IT IS FURTHER HEREBY ORDERED that the Defendant's Motion to Dismiss, which was considered by this Court as a Motion for Summary Judgment, is hereby denied.

IT IS FURTHER HEREBY ORDERED that the Idaho State Liquor Dispensary is dismissed as a party Defendant in the above entitled action.

DONE AND ENTERED this 22 day of February, 1996.

/s/ J.R. Michaud
JAMES R. MICHAUD
DISTRICT JUDGE

(Certificate Of Service Omitted In Printing)

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**IN THE DISTRICT COURT OF
THE FIRST JUDICIAL DISTRICT STATE OF IDAHO,
IN AND FOR THE COUNTY OF BONNER**

KRISTINE L. FANKELL, Plaintiff/Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants/Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendants.	Case No. CV-95-00529 **NOTICE OF APPEAL** (Filed April 4, 1996)

TO: THE ABOVE NAMED RESPONDENT, KRISTINE L. FANKELL, AND THE PARTY'S ATTORNEYS, JAMES A. RAEON, P.O. BOX 1237, COEUR d'ALENE, ID., 83816, AND WILLIAM B. LATTA, JR., P.O. BOX 2192, BOISE, ID., 83701-2192, AND THE CLERK OF THE COURT, NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants Marion Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers, appeal against the above named respondent to the Idaho Supreme Court from that portion of the Order denying these Defendants' Motion to Dismiss, considered by the Court as a Motion for Summary Judgment, rejecting their defense of qualified immunity under 42 U.S.C. § 1983, entered in the above entitled action on the 23rd of February, 1996, Honorable Judge Michaud presiding.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 above is an appealable order under and pursuant to the long-standing case law of qualified immunity under 42 U.S.C. § 1983, most recently affirmed in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). The U.S. Supreme Court in *Behrens* held that a government official asserting a defense of qualified immunity under 42 U.S.C. § 1983 has an immediate right of appeal of an unfavorable immunity ruling upon either a motion to dismiss or a motion for summary judgment.

3. The reporter's transcript is not requested.

4. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.: All briefs and memorandums in support or opposition to Defendant's Motion to Dismiss.

5. I certify:

(a) That a copy of this notice of appeal has been served on the reporter.

(b) That the appellant is exempt from paying an estimated transcript fee because no transcript has been requested.

(c) That the appellants are exempt from paying the estimated fee for the preparation of the clerk's record because the State of Idaho and its officers are exempt from paying fees for the preparation of the clerk's record.

(d) That the appellants are exempt from paying the appellate filing fee because the State of Idaho and its officers are exempt from paying appellate filing fees.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 4 day of April, 1996.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Nicole S. McKay
Nicole S. McKay
Deputy Attorney General

(Certificate Of Service Omitted In Printing)

IN THE SUPREME COURT OF THE STATE OF IDAHO

KRISTINE L. FANKELL, Plaintiff-Respondent, v. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants-Appellants, IDAHO SATE LIQUOR DISPENSARY, Defendants.	)	ORDER DISMISSING APPEAL NO. 22880 Ref. No. 96S-107 (Filed April 23, 1996)

The NOTICE OF APPEAL is from an Order Denying a Motion for Summery [sic] Judgment, which is not appealable under I.A.R. 11; however, the Appellants state in the Notice of Appeal that it is appealable under 42 U.S.C. §1983 and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed. 2d 773 (1996). The Court has reviewed the Notice of Appeal and statement by Appellants; therefore, after due consideration,

IT HEREBY IS ORDERED that the NOTICE OF APPEAL be, and hereby is, DISMISSED for the reason it is not from a final order or Judgment.

DATED this 23rd day of April, 1996.

By Order of
the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge James r. Michaud

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IN THE SUPREME COURT OF IDAHO

KRISTINE L. FANKELL, Plaintiff/Respondent, vs. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants/Appellants, IDAHO STATE LIQUOR DISPENSARY, Defendants.	)	Appeal No. 22880 **DEFENDANTS-APPELLANTS' PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL AND MEMORANDUM SUPPORTING PETITION FOR REHEARING** (Filed May 2, 1996)

Defendants-Appellants, by and through their attorney of record, Michael S. Gilmore, Deputy Attorney General, petition for rehearing from the Court's order of April 23, 1996, dismissing their appeal. This petition for rehearing presents a single legal issue for the court's consideration:

Issue on Petition for Rehearing

When a plaintiff's complaint is based in whole or in part upon claims under 42 U.S.C. § 1983, and the defendants move to dismiss under Rule 12(b)(6) and/or move for summary judgment based in whole or in part upon their claim of qualified immunity under 42 U.S.C. § 1983, is the trial court's order denying the motion to dismiss and/or motion for summary judgment a final order appealable as a matter of right with regard to the issue of denial of a claim of qualified immunity?

Statement of Facts

Kristine L. Fankell, the Plaintiff-Respondent in this case, filed a Complaint against persons including the Defendants-Appellants Marian Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers. See Exhibit 1. That Complaint was grounded in allegations of violations of 42 U.S.C. § 1983, in particular, in deprivation of property without due process of law. *Id.* at ¶¶ 2, 22 and 28. Defendants-Appellants moved to dismiss the Complaint pursuant to I.R.C.P. 12(b)(6). See Exhibit 2. Among other things, Defendants' memorandum in support of their motion to dismiss asserted their defense of qualified immunity under 42 U.S.C. § 1983. See Exhibit 3, pp. 2, 6-13.

The district court treated Defendants-Appellants' motion as a motion for summary judgment under Rule 56 rather than a motion to dismiss under Rule 12(b)(6). On February 23, 1996, the clerk of the court entered the district court's order denying the Defendants-Appellants' motion. See Exhibit 4. On April 4, 1996, the Defendants-

Appellants filed a timely Notice of Appeal. See Exhibit 5. Paragraphs 1 and 2 of that Notice of Appeal provided the following:

> 1. The above named appellants Marion Johnson, Gordon Hubbard, Margo Edmiston, and H. Dean Summers, appeal against the above named respondent to the Idaho Supreme Court from that portion of the Order denying these Defendants' Motion to Dismiss, considered by the Court as a Motion for Summary Judgment, rejecting their defense of qualified immunity under 42 U.S.C. § 1983, entered in the above entitled action on the 23rd of February, 1996, Honorable Judge Michaud presiding.
>
> 2. That the parties have a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 above is an appealable order under and pursuant to the long-standing case law of qualified immunity under 42 U.S.C. § 1983, most recently affirmed in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). The U.S. Supreme Court in *Behrens* held that a government official asserting a defense of qualified immunity under 42 U.S.C. § 1983 has an immediate right of appeal of an unfavorable immunity ruling upon either a motion to dismiss or a motion for summary judgment.

On April 23, 1996, the clerk of the Supreme Court issued an Order Dismissing Appeal. See Exhibit 6. The body of the Order Dismissing Appeal said:

> The NOTICE OF APPEAL is from an Order Denying a Motion for Summery [sic] Judgment, which is not appealable under I.A.R. 11; however, the Appellants state in the Notice of

> Appeal that it is appealable under 42 U.S.C. § 1983 and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed. 2d 773 (1996). The Court has reviewed the Notice of Appeal and statement by Appellants' therefore, after due consideration.
>
> IT HEREBY IS ORDERED that the NOTICE OF APPEAL be, and hereby is, DISMISSED for the reason it is not from a final order or judgment.

The Defendants-Appellants contend in this petition for rehearing that the district court's order denying their motion is a final order to the extent that it has denied their claim of qualified immunity under 42 U.S.C. § 1983 and that they have a right to appeal that part of the order denying the claim of qualified immunity under Idaho Appellate Rule 11(a)(1). Alternatively, if they do not have that right, then they have a right to appeal that part of the order denying the claim of qualified immunity as a matter of federal law in order to prevent discrimination by a state court against a federal claim or defense.

Legal Argument

I. The District Court's order denying the defendants' motion for summary judgment is a final order to the extent that it denies a claim of qualified immunity under 42 U.S.C. § 1983, and defendants have a right to appeal the part of the order denying their claim of qualified immunity under I.A.R. 11(a)(1)

42 U.S.C. § 1983 is a federal statute. Suits brought under 42 U.S.C. § 1983 alleging a state employee's violation of a federal constitutional right present the same issues of liability and immunity as so-called *Bivens*

actions brought against federal employees directly under the federal constitution.[1] Qualified immunity is one of the defenses that may be asserted by state employees when they are sued under 42 U.S.C. § 1983. *Arnzen v. State*, 123 Idaho 899, 904-06, 854 P.2d 242, 247-49 (1993). The Supreme Court of the United States has equated the qualified immunity defenses available in cases brought under 42 U.S.C. § 1983 and *Bivens* cases:

> Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

Butz v. Economou, 438 U.S. 478, 504, 98 S. Ct. 2894, 2909, 57 L. Ed. 2d 895 (1978). See, also, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, n. 30, 102 S. Ct. 2727, 2738, n. 30, 73 L. Ed.

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[1] *Bivens* actions are named after the decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

2d 396 (1982); *Malley v. Briggs*, 475 U.S. 335, 340, n. 2, 106 S. Ct. 1092, 1095, n. 2, 89 L. Ed. 2d 271 (1986).

As a matter of practice, courts do not distinguish between the immunities available under 42 U.S.C. § 1983 and in *Bivens* actions, citing opinions in both kinds of cases interchangeably in an explication of immunity law. See, *e.g.*, *Arnzen*, 123 Idaho at 904, 854 P.2d at 247, which cites *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (*Bivens* claim against federal officer), *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (*Bivens* claim against federal officer), *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (*Bivens* claim against federal agent), and *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (section 1983 claim against state officer), in explication of qualified immunity defenses under 42 U.S.C. § 1983.

Denials of qualified immunity are immediately appealable as final orders. In the recent case of *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996), the Supreme Court of the United States explained the significance of a qualified immunity defense in a *Bivens* case and that denial of a claim of qualified immunity in such a case is a final, appealable decision, be the denial at the stage of a Rule 12(b)(6) motion or a motion for summary judgment. Of course, its comments on finality are also applicable to the case now before the Court, which is brought under 42 U.S.C. § 1983:

> Section 1291 of Title 28, U.S.C., gives courts of appeals jurisdiction over "all final decisions" of district courts. . . . It does not, however, bar review of all prejudgment orders. In *Cohen* [*v. Beneficial Industrial Loan Corp.*, 336 U.S. 541, 546, 69 S. Ct. 1221, 1225, 93 L. Ed. 2d 1528 (1949),] we described a "small class" of district court decisions that, though short of final judgment, are immediately appealable because they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself that it requires that appellate consideration be deferred until the whole case is adjudicated." *Ibid.* . . . The issue in the present case is the extent to which orders denying governmental officers' assertions of qualified immunity come within the *Cohen* category of appealable decisions.
>
> As set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), the qualfied-immunity defense "shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *id.*, at 818, 102 S. Ct. at 2738 (citing *Procunier v. Navarette*, 434 U.S. 555, 565, 98 S. Ct. 855, 861, 55 L. Ed. 2d 24 (1978)). *Harlow* adopted this criterion of "objective legal reasonableness," rather than good faith, precisely in order to "permit the defeat of insubstantial claims without resort to trial." 457 U.S., at 879, 813, 102 S. Ct., at 2739, 2735-2736. Unsurprisingly, then, we later found the immunity to be "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal [immunity] question." *Mitchell v. Forsyth*, [472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985)]. And, as with district-court rejection of claims to other such entitlements distinct

> from the merits, see, *e.g.*, *Puerto Rico Aqueduct [and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-146, 113 S. Ct. 684, 688-689, 124 L. Ed. 2d 605 (1993)] (Eleventh Amendment immunity); *Abney v. United States*, 431 U.S. 651, 662, 97 S. Ct. 2034, 2041-2042, 52 L. Ed. 2d 651 (1977) (right not to be subjected to double jeopardy), we held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell, supra*, at 530, 105 S. Ct., at 2817. See also *Johnson v. Jones*, 515 U.S. ___, ___, 115 S. Ct. 2151, 2155-2156, 132 L. Ed. 2d 238 (1995).

___ U.S. at ___, 116 S. Ct. at 838-39. As the Court clarified: "*Mitchell* clearly establishes that an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary-judgment stage is a 'final' judgment subject to immediate appeal." ___ U.S. at ___, 116 S. Ct. at 839.

Drawing upon these precedents, the Supreme Court concluded that the defendants were entitled to bring successive appeals – the first from the denial of their motion to dismiss under Rule 12(b)(6) on the basis of qualified immunity, and the second from the denial of their motion for summary judgment on the basis of qualified immunity – because each decision was final from the point of view of the defendant claiming immunity, *i.e.*, each was a final determination whether the defendant would be subject to discovery or trial, which are the two things that immunity would shield the defendants from.

___ U.S. at ___, 116 S. Ct. at 839-41.[2] That the decision in *Behrens*, which is a *Bivens* case, would also apply to a § 1983 case is apparent by the Court's unqualified discussion of the rules of appeal of qualified immunity defenses in the case of *Johnson v. Jones*, 515 U.S. ___, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), a case decided under § 1983. ___ U.S. at ___, 116 S. Ct. at 842.

To be sure, the cases previously cited, whether § 1983 cases or *Bivens* cases, were decided under federal procedural statutes, and one might argue that the cases stand for nothing more than a construction of federal law concerning finality for purposes of appeal. Were the right to appeal from a denial of a 12(b)(6) motion to dismiss on the basis of qualified immunity or the right to appeal from the denial of a motion for summary judgment on the basis of qualified immunity merely a procedural right alone, Defendants-Appellants would accept that premise. But, the cases cited make it clear that the right protected is more than procedural – it is substantive:

> *Mitchell* bears particularly on the present case. There, the Attorney General of the United States appealed from a district court order denying his

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[2] The appellate court's review of the trial court's decision denying qualified immunity does not prevent issues unrelated to qualified immunity proceeding to trial. *Cf. Behrens*, ___ U.S. at ___, 115 S. Ct. at 841. Whether the entire case should be stayed while awaiting appellate review of the qualified immunity defense or the remainder of the case should proceed to trial is a matter within judicial discretion. But, the right to appellate review of issues associated with denial a claim of qualified immunity cannot be defeated by the defendants' obligation to stand trial on unrelated issues. ___ U.S. at ___, 115 S. Ct. at 841-42.

> motion to dismiss on grounds of qualified immunity. The court of appeals held that the order was not appealable and remanded the case for trial. We reversed, holding that the order denying qualified immunity was a collateral order immediately appealable under *Cohen*. We found that absent immediate appeal, the central benefits of qualified immunity – avoiding the costs and general consequences of subjecting public officials to the risk of discovery and trial – would be forfeited. . . . "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell, supra,* at 526, 105 S. Ct., at 2815 (emphasis is original).

Puerto Rico Aqueduct, 506 U.S. at 143-44, 113 S. Ct. at 687 (footnote omitted).

The right to be spared the time and expense of discovery or trial under a claim of qualified immunity is a substantive benefit. The right to appeal from the denial of a 12(b)(6) motion on grounds of qualified immunity or to appeal from the denial of a motion for summary judgment on grounds of qualified immunity is a final order regarding that substantive right. The Defendant-Appellants' appeal is squarely within the list of appealable orders in Idaho Appellate Rule 11(a)(1):

> **Rule 11. Appealable judgments and orders.** – An appeal as a matter of right may be taken to the Supreme Court from the following judgments and orders:
>
> (a) Civil Actions. From the following judgments and orders of a district court in a civil case:

> (1) Judgments, *orders* and decrees *which are final,* including orders of the district court granting or denying peremptory writs of mandate and prohibition.

Emphasis added. Because the order denying a claim of qualified immunity[3] not to stand trial for a claim brought under 42 U.S.C. § 1983 is a final order, it is appealable under I.A.R. 11(a)(1).

II. If the Defendants-Appellants have no right under I.A.R. 11(a)(1) to appeal the part of the district court's order denying their claim of qualified immunity, then they have a right to appeal that part of the order denying the claim of qualified immunity as a matter of federal law to prevent state court discrimination against a federal claim or defense

State courts must apply the federal rules of substantive law in a case brought under 42 U.S.C. § 1983. This is clear from the case of *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). In *Howlett* Florida citizens sued local school board members and school officials in state courts under 42 U.S.C. § 1983. Despite the precedent that local governments like municipalities or school boards were persons subject to suit under 42 U.S.C. § 1983, see *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Florida courts held that Florida had not

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[3] This same argument on appealability of orders denying claims of qualified immunity would apply to claims of the absolute immunity defenses recognized under 42 U.S.C. § 1983: *e.g.*, legislative immunity, judicial immunity, prosecutorial immunity, testimony immunity.

waived a municipality's sovereign immunity from suit under 42 U.S.C. § 1983, so the Florida state courts would not entertain suits against municipalities under that statute. The Supreme Court of the United States reversed. In doing so, it explicated the relationship between state courts, state law, and federal law under 42 U.S.C. § 1983, noting that the Florida District Court of Appeal's "holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action." 496 U.S. at 366, 110 S. Ct. at 2437. The Court elaborated:

> Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the State as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.
>
> . . . .
>
> Three corollaries follow from the proposition that "federal" law is part of the "Law of the Land" in the State:
>
> 1. A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a "valid excuse." [Citation omitted.] "The existence of the jurisdiction creates an implication of duty to exercise it." [Citations omitted.]
>
> 2. An excuse that is inconsistent with or violates federal law is not a valid excuse: The

> Supremacy Clause forbids state courts to dissociate themselves from federal law because a disagreement with its content or refusal to recognize the superior authority of its source. . . .
>
> 3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. [Citations omitted.] The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. . . . In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law. [Citations omitted.]

496 U.S. at 367-72, 110 S. Ct. at 2438-41 (footnote omitted).

There were only three cases in which the Supreme Court of the United States accepted a state court claim that its neutral rules of procedure or jurisdiction prevented the state court from exercising jurisdiction over a federal claim according to federal law: where state statute permitted discretionary dismissal of both federal and state claims when neither plaintiff nor defendant were resident of the state, *Douglas v. New York, N.H. & H.R. Co*, 279 U.S. 377, 49 S.Ct 355, 73 L.Ed. 747 (1929); where a city court was denied jurisdiction of both state and federal claims that arose outside its territory, *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1940); and where a state court applied a neutral doctrine of *Forum non conveniens, Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S.

1, 71 S.Ct. 1, 95 L.Ed.3 (1950). 496 U.S. at 474-75, 110 S.Ct. 15 2442. None of those situations are present here.

Idaho does not prohibit its courts at either the trial or appellate level from considering claims brought under 42 U.S.C. § 1983. Idaho Appellate Rule 11 explicitly authorizes certain appeals from orders preceding final judgment, including those from "[a]n order granting . . . a new trial, including such orders which contain a conditional grant . . . of a new trial subject to additur and remittitur," I.A.R. 11(a)(5); "[a]ny order however denominated, reducing a charge of criminal conduct over the objection of the prosecutor," I.A.R. 11(c)(5), or "[a]n order granting a motion to suppress evidence," I.A.R. 11(c)(8). Given the availability of appellate jurisdiction in Idaho under state law for certain kinds of orders preceding final judgments, the state cannot discriminate against federal claims or defenses by denying the Defendants-Appellants' federal right to appeal from the denial of their motion for summary judgment upon a claim of qualified immunity under 42 U.S.C. § 1983.

Summary

The Defendants-Appellants therefore pray that the Court reconsider its Order Dismissing Appeal and pray that the Court reinstate their appeal from the district court's denial of their motion for summary judgment based upon a claim of qualified immunity under 42 U.S.C. § 1983.

Dated this 2nd day of May, 1996.

State of Idaho
Office of the Attorney General

By /s/ Michael S. Gilmore
Michael S. Gilmore
Deputy Attorney General

(Certificate Of Service And
Attached Exhibits And Affidavit Omitted In Printing)

IN THE SUPREME COURT OF THE STATE OF IDAHO

KRISTINE L. FANKELL, Plaintiff-Respondent, v. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants-Appellants, and IDAHO STATE LIQUOR DISPENSARY, Defendant.	)	ORDER DENYING PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL NO. 22880 Ref. No. 96S-108 (Filed May 23, 1996)

An ORDER DISMISSING APPEAL was issued April 23, 1996, for the reason the Notice of Appeal was not from a final order or judgment. A PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL AND MEMORANDUM SUPPORTING PETITION FOR REHEARING with attachments and AFFIDAVIT OF COUNSEL was filed by Appellants May 2, 1996. The Court is fully advised; therefore, after due consideration,

IT HEREBY IS ORDERED that the PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL be, and hereby is, DENIED and this appeal is DISMISSED with the Remittitur to issue forthwith.

DATED this 23rd day of May, 1996.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge James R. Michaud

IN THE SUPREME COURT
OF THE STATE OF IDAHO

KRISTINE L. FANKELL, Plaintiff-Respondent, v. MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, H. DEAN SUMMERS, each of them individually, Defendants-Appellants, and IDAHO STATE LIQUOR DISPENSARY, Defendant.	)	REMITTITUR NO. 22880 (Filed May 23, 1996)

TO: FIRST JUDICIAL DISTRICT COURT, BONNER COUNTY.

The Court having entered an Order dismissing this appeal on May 23, 1996; therefore,

IT IS HEREBY ORDERED that the appeal herein from the Judgment of the District Court be, and is hereby dismissed, no costs taxed.

DATED this 23rd day of May, 1996.

/s/ Carmen Bird
Clerk of the Supreme Court
STATE OF IDAHO

Supreme Court, U.S.
FILED
DEC 5 1996
CLERK

No. 96-292

In The

Supreme Court of the United States

October Term, 1996

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF FOR PETITIONERS

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58 pp

QUESTION PRESENTED FOR REVIEW

1. When a state trial court denies defendants' motion to dismiss or motion for summary judgment brought on the basis of qualified immunity under 42 U.S.C. § 1983, do defendants have a federal right to immediate appellate review of the qualified immunity defense in the appropriate state appellate court before discovery and trial?

PARTIES TO THE PROCEEDING

The Idaho State Liquor Dispensary was an additional party to the proceeding before the Idaho district court, but was dismissed as a party by the Idaho district court. Therefore, the Idaho State Liquor Dispensary was not a party to the appeal dismissed by the Idaho Supreme Court and is not a party to the proceeding before this Court. The remaining parties to the proceeding are listed in the caption.

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JURISDICTION

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257, which provides "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any . . . immunity is . . . claimed under the . . . statutes of . . . the United States." The petition for certiorari was granted from a decision of the Supreme Court of Idaho, which is the highest court of Idaho, dismissing Petitioners' appeal from a state trial court denial of their motion to dismiss on the ground of qualified immunity under 42 U.S.C. § 1983. The petition for certiorari was timely filed with this Court on August 20, 1996, from the denial of the Petitioners' motion for rehearing on May 23, 1996, 89 days after the entry of the order denying the petition for rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, cl. 2 of the Constitution of the United States (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Idaho Appellate Rule 11(a) provides:

Rule 11. Appealable judgments and orders.

An appeal as a matter of right may be taken to the Supreme Court [of Idaho] from the following judgments and orders:

(a) Civil Actions. From the following judgments and orders of a district court in a civil action:

(1) Judgments, orders and decrees which are final, including orders of the district court granting or denying peremptory writs of mandate and prohibition.

(2) Decisions by the district court dismissing, affirming, reversing or remanding an appeal.

(3) Judgments made pursuant to a partial judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.

(4) Any contempt order or judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.

(5) An order granting or refusing a new trial, including such orders which contain a conditional grant or denial of a new trial subject to additur and remittitur.

(6) An order granting or denying a motion for judgment notwithstanding the verdict.

(7) Any order made after final judgment including an order denying a motion to set aside a default judgment, but excluding an order granting a motion to set aside a default judgment.

STATEMENT OF THE CASE

On August 2, 1992, Plaintiff-Respondent Kristine L. Fankell was appointed to a probationary position as a liquor store clerk for the Idaho Liquor Dispensary, an agency of the State of Idaho. J.A. 6. In late March, 1993, Respondent's job performance was rated at "below expectation." J.A. 7. She filed a grievance from the performance evaluation on April 2, 1993. *Id.* On April 7, 1993, she was notified that because she had failed to satisfactorily complete her probationary period, she would be given the option to resign without prejudice or, if she declined to resign, her employment would be terminated. *Id.* She did not resign, and her employment was terminated on April 22, 1993. *Id.*

On April 11, 1995, Respondent Fankell filed suit in Idaho's First District Court.[1] Her first amended complaint, filed shortly thereafter, contained two counts, both under 42 U.S.C. § 1983. The first count contended there were violations of her substantive due process rights when her employment was terminated; the second, that there were violations of her procedural due process rights when her grievance was not addressed. J.A. 7, 9. The complaint sought damages, including punitive damages, and injunctive relief. J.A. 10-12.

The first amended complaint named as Defendants four individuals and the Idaho State Liquor Dispensary (the Dispensary). The four individuals were Respondent's immediate supervisor Johnson and higher ranking officers or employees of the Dispensary up to and including Superintendent Summers. J.A. 3-4. The four individual Defendants are the four Petitioners in this Court.

The Defendants did not answer the complaint, but instead moved to dismiss under Idaho Rule of Civil Procedure 12(b)(6). J.A. 14. The Dispensary raised its status as a state agency as a defense, contending that a state agency is not a person who can be sued under 42 U.S.C. § 1983. J.A. 33-34. The four individual Defendants raised qualified immunity as their defense, contending that they

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[1] Idaho's statute of limitations for cases brought under 42 U.S.C. § 1983 is the two-year statute of limitations for torts provided by Idaho Code § 5-219(4). See *Henderson v. State*, 110 Idaho 308, 311, 715 P.2d 978, 981 (1986), *cert. denied*, 477 U.S. 907, 106 S. Ct. 3282, 91 L. Ed. 2d 571 (1986). Respondent's suit was timely filed.

had not violated any clearly established law in derogation of Respondent's rights. J.A. 23-31.

The key to Petitioners' argument in their brief supporting their qualified immunity defense depended on the interplay of state and federal law. Petitioners' starting assumption was that an employee who had not completed her probationary period did not yet have a state-created liberty or property interest in continued employment that would trigger due process requirements before termination of employment. Petitioners explained that the Idaho law setting forth when the probationary period ended and when a new employee like Plaintiff-Respondent could acquire a protectible liberty or property interest in her employment was unclear at the time of termination of her employment. They argued that Idaho Code § 67-5309(j) then set the probationary period at six months, that the Idaho State Personnel Commission rule 28.15.A.2.a[2] interpreted this statutory provision to mean 1,040 hours of work (*i.e.*, twenty-six forty-hour work weeks), and that the Idaho Supreme Court did not reconcile the potential conflict between the statute's use of months and not hours and the rule's use of hours until the year after termination of Plaintiff-Respondent's employment. See *Hood v. Idaho Dept. of Health & Welfare*, 125 Idaho 151, 153, 868 P.2d 479, 481 (1994), which held that the rule setting the probationary period at 1,040 hours erroneously construed the statute and that probationary periods end after six months regardless of the

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[2] The official citation to this rule is IDAPA 28.15.A.2.a. IDAPA is an acronym for Idaho Administrative Procedure Act.

number of hours worked.[3] Petitioners argued that they reasonably relied upon the administrative rule in place at the time that Respondent's employment was terminated to determine whether Respondent had a protectible liberty or property interest in continued employment, so they had not violated clearly established law when her employment was terminated without further process of law, and, therefore, they were entitled to qualified immunity in a suit brought under 42 U.S.C. § 1983. J.A. 28-31.

Regarding the procedural due process claim, Petitioners argued that it was not a clearly established right, at the time of Respondent's termination, that she had a property interest in her employment, requiring due process prior to the termination. J.A. 59-60. Under the rule in place at the time Respondent was terminated, she was a probationary employee, and there were no liberty or property interests requiring federal due process protections. *Id.*

The trial court treated the motion to dismiss as a motion for summary judgment because affidavits had been filed in connection with consideration of the motion and denied Petitioners' motion from the bench, although it did grant the Dispensary's motion to dismiss. On February 23, 1996, the trial court filed a written order

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[3] The *Hood* decision was issued on February 9, 1994. The statute was amended to provide a 1,040-hour probationary period and the amendment signed into law by Governor Andrus on March 31, 1994. See 1994 Idaho Sessions Laws, ch. 294. Thus, the Idaho Legislature restored the Idaho Personnel Commission's understanding of the law within fifty days after *Hood* was issued.

summarily denying Petitioners' portion of the motion without explanation. J.A. 62-63.

Petitioners timely filed a notice of appeal to the Idaho Supreme Court appealing "from that portion of the Order . . . rejecting [Petitioners'] defense of qualified immunity under 42 U.S.C. § 1983."[4] J.A. 64-66. The Idaho Supreme Court *sua sponte* issued a cursory order dismissing the appeal "for the reason that it is not from a final order or judgment" under Idaho Appellate Rule 11.[5] J.A. 67. Petitioners petitioned for rehearing and provided a memorandum briefing the issue of the finality of and immediate appealability of trial court denials of motions that raise a defense of qualified immunity under 42 U.S.C. § 1983. J.A. 69-83. The Idaho Supreme Court issued an order denying the petition for rehearing. J.A. 84. Petitioners timely petitioned for a writ of certiorari, which was granted. ___ U.S. ___, 117 S. Ct. 356, 136 L. Ed. 2d ___ (October 21, 1996).

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[4] Idaho Appellate Rule 14(a) allows appeal "within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment, order or decree of the district court appealable as a matter of right in any civil or criminal action." The appeal was filed with the district court on April 4, 1996, forty-one days after the date of the filing stamp on the district court's order. J.A. 64.

[5] The Idaho Supreme Court's orders in this case were issued under the name of the clerk of the court, much like Petitioners were notified in this case that their petition for a writ of certiorari had been granted by a letter from the clerk of the court.

SUMMARY OF ARGUMENT

Qualified immunity is a defense that Congress intended to be available in § 1983 cases. It is the nature of qualified immunity – an immunity not only from liability, but also from trial and the other burdens of litigation for discretionary actions taken in areas in which there is no clearly established law – that makes qualified immunity a substantive right. Because qualified immunity is an immunity from suit rather than a defense to liability, it is effectively lost if a case is erroneously permitted to go to trial. A pretrial order denying a motion to dismiss or motion for summary judgment on grounds of qualified immunity is a final decision that is immediately appealable under federal law because without immediate appellate review, the qualified immunity entitlements not to stand trial and not to bear the burdens of litigation are lost when a qualified immunity motion is erroneously denied.

Idaho's appellate rules provide for appeal as a matter of right from "[j]udgments, orders and decrees which are final," but the Idaho Supreme Court declined to accept the finality of an order denying a qualified immunity motion in this § 1983 case. It therefore denied immediate appellate review of a trial court order denying a qualified immunity motion. Given this Court's unambiguous holdings that denial of a qualified immunity motion is final, the Idaho Supreme Court must accept and apply the federal definition of finality under Idaho's appellate rules, and the Idaho Supreme Court must take an appeal as a matter of right from denial of a qualified immunity motion because the denial is an order or decree that is

final, which is the standard of Idaho's own appellate rules.

In the alternative, if the Idaho Supreme Court is not required by federal law to accept the federal definition of finality in construing its own appellate rules when it hears a § 1983 case, Idaho's state law determination that orders denying qualified immunity motions are not appealable should be pre-empted to preserve the benefits of this federal defense. Idaho has no valid excuse not to apply the federal law of immediate appeal of denial of a qualified immunity motion. First, denial of immediate appeal from a qualified immunity motion does not merely burden the benefits of qualified immunity (avoiding trial and the burdens of litigation), it extinguishes them altogether when the trial court has ruled erroneously. Second, denial of immediate appeal is an obstacle to implementing the Congressional policy that qualified immunity will be retained. Third, denial of immediate appeal leads to different results depending whether the suit is brought in a state or federal forum. Fourth, denial of immediate appeal discriminates against this federal category of a collateral order when appeal is allowed from several state categories of collateral order. Finally, failing to pre-empt the state law rule denying the immediate appeal would leave § 1983 defendants on a different playing field from § 1983 plaintiffs because § 1983 plaintiffs have the benefit of decisions pre-empting state procedures that burden their federal rights, *e.g.*, notice-of-claim statutes or local rules of governmental immunity. Idaho's appellate rule that denies the federal right of appeal from denial of a qualified immunity

motion should be pre-empted to preserve immunities available to § 1983 defendants under federal law.

In conclusion, by requiring Idaho to give the federal meaning of finality to orders and decrees when it hears a § 1983 case, or by pre-empting restrictions on appellate jurisdiction that deny defendants the benefits of federal immunities, Idaho should hear an appeal from the denial of a qualified immunity motion.

ARGUMENT

Trial courts in every State in the Union hear cases brought under 42 U.S.C. § 1983, and appellate courts of every State in the Union hear appeals from trial court decisions in these cases. See Appendix I to this brief. Qualified immunity is probably the most important defense to the thousands of state actors each year sued in state courts under § 1983 because when it is successfully invoked, it not only shields them from liability, it also shields them from the burdens of litigation and trial.[6]

[6] The law of qualified immunity has developed both in suits brought against federal officers and employees under the Constitution itself and in suits brought against state officers and employees under § 1983. The Court has said it would be "untenable to draw a distinction for purposes of immunity law" between the two types of suits. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, n.30, 102 S. Ct. 2727, 2738, n.30, 73 L. Ed. 2d 396 (1982), citing *Butz v. Economou*, 438 U.S. 478, 504, 98 S. Ct 2894, 2909, 57 L. Ed 2d 895 (1978). Accordingly, this brief cites the immunity law of § 1983 interchangeably with the immunity law of suits against federal officers or employees brought directly under the Constitution.

Moreover, this defense is critically important to the effective functioning of state and local government for at least three reasons: It protects reasonable actions undertaken by public officers from attacks that would otherwise undermine the necessary exercise of governmental discretion, it prevents the disruption of government by litigation that would second-guess discretionary actions that did not violate clearly established law, and it encourages people to serve in government by providing an objective defense to challenges to their reasonable actions. This case will determine whether § 1983 defendants sued in state courts have a right to immediate appellate review of denial of their qualified immunity motions or whether they are subject to the whim of varying state appellate procedures when seeking to preserve the benefits of their qualified immunity defense after denial of a qualified immunity motion.

I.

PRETRIAL DENIAL OF A QUALIFIED IMMUNITY MOTION IS A FINAL DECISION FROM WHICH DEFENDANTS HAVE AN IMMEDIATE FEDERAL RIGHT TO APPEAL IN ORDER TO VINDICATE THE BENEFITS OF QUALIFIED IMMUNITY – AVOIDANCE OF TRIAL AND THE BURDENS OF LITIGATION

There is no doubt about the premises of qualified immunity law central to this appeal. First, Congress intended qualified immunity to be an available defense in § 1983 cases: "Congress did take common-law principles into account in providing certain forms of absolute and qualified immunity." *Howlett v. Rose*, 496 U.S. 356, 383, 110 S. Ct. 2430, 2446, 110 L. Ed. 2d 332 (1990). Just as

Congress intended a remedial purpose to § 1983, it intended that public officers who acted reasonably and in good faith would be immune from suit. *E.g., Wood v. Strickland*, 420 U.S. 308, 316, 95 S. Ct. 992, 998, 43 L. Ed. 2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48, 94 S. Ct. 1683, 1692, 40 L. Ed. 2d 90 (1974), both cited in *Howlett*, 496 U.S., at 383, 110 S. Ct., at 2446-47.

Second, it is the nature of qualified immunity – an immunity from suit and the other burdens of litigation for discretionary actions taken in areas in which there is no clearly established law, as well as immunity from liability – that makes qualified immunity a *substantive* right to be free of these burdens, not a *procedural* one. *Mitchell v. Forsyth*, 472 U.S. 511, 525-26, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985), explained:

> The conception animating the qualified immunity doctrine . . . is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" . . . [T]he "consequences" with which we were concerned in *Harlow* are not limited to liability for money damages; they also include "the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as "[i]nquiries of this kind can be peculiarly disruptive of effective government."

> With these concerns in mind, the *Harlow* Court refashioned the qualified immunity doctrine in such a way as to "permit the resolution of many insubstantial claims on summary judgment" and to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery" in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.

(Citations omitted.) Given qualified immunity's protection for government employees who must frequently navigate in uncharted waters where the "correct" legal answer is not clear, *Mitchell* explained: "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.*, at 526, 105 S. Ct., at 2815.

Third, a pretrial order denying a qualified immunity motion is a final decision that is immediately appealable under federal law.[7] This principle was also established in

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[7] "Final decision" is the term used in 28 U.S.C. § 1291, the federal appellate statute, to describe appealable district court rulings. This Court has construed "final decision" to be more encompassing than "final judgment" under the collateral order doctrine of *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), and its progeny. This brief uses the term "final decision" to describe rulings appealable under federal statute, including those preceding final judgments. "Judgments, orders and decrees which are final" are the terms used in Idaho Appellate Rule 11(a)(1) to describe one category of appealable district court rulings. This brief uses the term "final order" to describe rulings preceding final judgment in state court and denying a qualified immunity motion under 42 U.S.C. § 1983.

Part III of *Mitchell*, 472 U.S., at 524-30, 105 S. Ct., at 2814-17, where the Court concluded that pretrial orders denying a qualified immunity motion fit into the category of immediately appealable collateral orders described in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 2d 1528 (1949). This holding was reiterated last term in *Behrens v. Pelletier*, ___ U.S. ___, ___, 116 S. Ct. 834, 839, 133 L. Ed. 2d 773 (1996): "*Mitchell* clearly establishes that an order rejecting the defense of qualified immunity at either the dismissal stage or the summary-judgment stage is a 'final' judgment subject to immediate appeal."

Fourth, denial of a qualified immunity motion is a final decision immediately appealable under the collateral order doctrine because without the right to immediate appellate review, the qualified immunity entitlements not to stand trial and not to bear the burdens of litigation are lost if a qualified immunity motion is erroneously denied. *Behrens*, ___ U.S., at ___, 116 S. Ct., at 838; *Mitchell*, 472 U.S., at 528, 105 S. Ct., at 2815. As *Mitchell* elaborated: "A major characteristic of the denial or granting of a claim appealable under *Cohen's* collateral order doctrine is that unless it can be reviewed before the proceedings terminate, it can never be reviewed at all." *Id.*, at 525, 105 S. Ct., at 2814-15 (citation and internal punctuation omitted). Loss of the right to appeal from erroneous denial of a qualified immunity motion results in loss of the substantive benefits of qualified immunity. That is why the right to an immediate appeal to protect qualified immunity is closely tied, indeed, inseparable, from the substantive right itself.

Despite these precedents, there are state appellate courts, including the Idaho Supreme Court, that refuse to allow immediate appellate review of trial court denials of qualified immunity motions. See n.4, Petitioners' Brief on Petition for a Writ of Certiorari, pp. 4-5. This is so even though Idaho's and every other States' appellate courts not only hear § 1983 appeals, but they also hear interlocutory appeals from trial court decisions and orders preceding final judgment in a variety of other subject matter areas. See Appendix II to this brief. Idaho courts, having opened their doors to § 1983 claims and having the authority to allow interlocutory appeals in a variety of subject matter areas, should not be allowed to deny immediate appeal of a trial court's denial of a qualified immunity motion and thereby effectively extinguish § 1983 defendants' most important federal defense – the defense that entitles the defendants to be freed of the burdens of litigation and trial.

II.

IDAHO LAW PROVIDES FOR APPEAL AS A MATTER OF RIGHT OF JUDGMENTS, ORDERS AND DECREES THAT ARE FINAL, AND IDAHO MUST ACCEPT THE FEDERAL DEFINITION OF FINALITY IN CASES BROUGHT UNDER 42 U.S.C. § 1983

Idaho district courts are courts of general jurisdiction,[8] and the Idaho Supreme Court has jurisdiction to

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[8] Article V, § 20, of the Idaho Constitution provides: "**Jurisdiction of district court.** – The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law."

review the district courts' decisions.[9] Idaho courts have thus opened their doors through their general jurisdiction to both state and federal cases. When they hear cases brought under 42 U.S.C. § 1983, Idaho courts, like all state courts, must apply federal rules of substantive law. *Howlett*, 496 U.S., at 377-78, 110 S. Ct., at 2443-44. The "elements of, and defenses to, a federal cause of action are defined by federal law," and cannot be altered by a State. *Id.*, at 375, 110 S. Ct., at 2442. Moreover, not only are States prohibited from altering the defenses to a § 1983 action, when they hear a § 1983 claim, they are obligated to "proceed in such manner that all the substantial rights of the parties under controlling federal law are protected," and federal policy is not displaced. *Felder v. Casey*, 487 U.S. 131, 151, 108 S. Ct. 2302, 2313-14, 101 L. Ed. 2d 123 (1988), quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S. Ct. 246, 251, 87 L. Ed. 239 (1942) (internal punctuation omitted).

Petitioners' assertion of a right to appeal denial of their qualified immunity motion is the assertion of the substantive right elucidated in *Mitchell* and *Behrens* and similar cases – the right not to go to trial and not to suffer the job- and governmental-disrupting burdens of discovery on a case that may be defeated on qualified immunity grounds at a later stage. Without the right to immediate

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[9] Article V, § 9, of the Idaho Constitution provides: "**Original and appellate jurisdiction of the Supreme Court.** – The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges thereof, ..."

appellate review, these central benefits of qualified immunity are forever lost to the Petitioners.

When state courts hear a § 1983 case, whatever interpretation they may give to a term like "final order" in other contexts, they are required by *Mitchell* and *Behrens* to accept the federal determination of finality regarding denial of a qualified immunity motion. State courts cannot extinguish qualified immunity's substantive benefits of freedom from the burdens of litigation available to those asserting this federal defense by relying on local rules to redefine what is or is not a final order in a § 1983 case. The policies underlying finality and immediate appealability of an order denying qualified immunity are no less substantive in state courts, and state courts are obligated to proceed in a manner that the federal defense and the policies it protects remain intact.

In this regard, Petitioners emphasize that those litigating before Idaho's district courts have the right to appeal to the Idaho Supreme Court from a variety of prejudgment orders. Idaho Appellate Rule (I.A.R.) 11(a) provides that appeals may be taken "as a matter of right" from "judgments, *orders* and decrees *which are final.*"[10]

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[10] Petitioners are focusing in this case before the Supreme Court of the United States on their claim that they may appeal to the Idaho Supreme Court *as a matter of right* from the Idaho district court's denial of their qualified immunity motion, not upon the *possibility of permissive appeal* to the Idaho Supreme Court. Idaho Appellate Rule 12(a) allows permissive appeal from an interlocutory order. However, the Idaho Supreme Court "intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11." *Buddell v.*

(Emphasis added.) Likewise, litigants have a right to appeal from other categories of orders preceding final judgment, including "[a]n order granting . . . a new trial," I.A.R. 11(a)(5); "[a]ny order . . . reducing a charge of criminal conduct over the objection of the prosecutor," I.A.R. 11(c)(5), or "[a]n order granting a motion to suppress evidence," I.A.R. 11(c)(8).

A state court's obligation to apply federal law and to exercise its appropriate jurisdiction over federal cases is of long-standing recognition. In *Mondou v. New York, N.H.&H.R.R.Co.*, 223 U.S. 1, 57-58, 32 S. Ct. 169, 177-78, 56 L. Ed. 2d 327 (1912), the Court held that Connecticut courts could not refuse to hear cases under the Federal Employers' Liability Act (FELA) simply because Connecticut disagreed with Congressional labor policy, stating that Congressional "policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state," and, further, that the "existence of jurisdiction creates a duty to exercise it." Likewise, in *Testa v. Katt*, 330 U.S. 386, 394, 67 S. Ct. 810, 815, 91 L. Ed. 967 (1947), the Court concluded that because Rhode Island courts had "adequate and appropriate" jurisdiction to hear cases

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Todd, 105 Idaho 2, 4, 665 P.2d 701, 703 (1983) (the court dismissed a permissive appeal from the denial of a summary judgment motion that had been certified by the trial court). It is likely that either or both of the Idaho district court or Idaho Supreme Court would have denied a motion for permissive appeal in this case under *Buddell's* guidance. More importantly, *permissive appeals* do not vindicate rights, and Petitioners are asserting a right of appeal from a trial court denial of a qualified immunity motion.

under state law similar to cases under the Federal Emergency Price Control Act, Rhode Island's courts could not refuse to entertain cases and enforce the latter law. *Mondou* and *Testa* were among the precedents cited by the Court in *Howlett* to hold that Florida courts of general jurisdiction must accept the federal law that local school districts and their officers are not entitled to sovereign immunity when sued under § 1983 and must provide a forum for those suits. 496 U.S., at 377-78, 110 S. Ct., at 2444.

The Idaho Supreme Court has appropriate and adequate appellate jurisdiction to protect the federal right at stake here. As well as express appellate jurisdiction over several categories of state-law pre-judgment orders, it has appellate jurisdiction over "judgments, orders and decrees" of the district court "which are final," and federal law is clear that denials of qualified immunity motions are final actions. The Idaho Supreme Court is therefore obligated, when presented with an appeal from such an order, to proceed in a manner that protects the federal right and preserves the underlying federal policy of review of those decisions to preserve immunity from trial and the burdens of litigation. The Idaho Supreme Court's definition of its appellate jurisdiction to include "orders and decrees which are final" requires it to apply the federal definition of finality and accept the appeal because it meets the federal definition of a final order or decree. Because Idaho has opened its state trial and appellate courts to § 1983 litigation, the Idaho Supreme Court is required to exercise its appellate jurisdiction in a manner that protects the federal rights of the parties

before it and to accept as "final" for appellate purposes the denial of a qualified immunity motion under § 1983.

III.

IF IDAHO CONSTRUES ITS APPELLATE RULES TO REJECT THE COLLATERAL ORDER DOCTRINE'S APPLICATION TO § 1983 CASES, THE APPELLATE RULES SHOULD BE PRE-EMPTED

Assuming for the sake of argument that the Idaho Supreme Court is not obligated to follow federal law in determining the "finality" of pre-judgment orders in § 1983 cases when it construes the meaning of "final" in its own appellate rules, that does not mean that the Idaho Supreme Court's dismissal of Petitioners' appeal should stand. In *Howlett*, the Court noted: "A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.' " 496 U.S., at 369, 110 S. Ct., at 2439. A valid excuse can include neutral procedural rules and neutral rules regarding administration of the state courts, *id.*, at 372, 110 S. Ct., at 2441, but, "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse," *id.*, at 371, 110 S. Ct., at 2440. The "valid excuse" principle does not apply here for two reasons. First, the Idaho Supreme Court is not applying a neutral rule, and second, even if it were, that rule should be pre-empted because of its burden on a substantive federal right.

To begin, dismissal of an appeal from denial of a qualified immunity motion is not the neutral application

of a procedural rule.[11] The Idaho Supreme Court takes other types of interlocutory appeals as a matter of right, including appeals from orders granting a new trial, appeals from orders suppressing evidence in criminal cases, and appeals from orders reducing criminal charges. *See* Idaho Appellate Rule 11. All of these are, to use the term of art in federal law, "collateral orders" because if they are not reviewed before trial, as a practical matter they cannot be effectively reviewed at all.[12] Denial of Petitioners' immediate appeal does not reflect an across-the-board state policy never to take appeals before final judgment from collateral orders; instead, denial of the appeal discriminates against the federal right and undermines the federal policy at stake in appeals from collateral orders in § 1983 cases.

As importantly, even if the dismissal of the appeal did reflect a neutral state rule regarding the timing of appeals and appeals from collateral orders, that rule should be federally pre-empted. While the general principle is that parties take the state courts as they find them,

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[11] Indeed, Petitioners argued in Part II that it was the denial of the provisions of a neutral procedural rule, not the application of a neutral procedural rule.

[12] An order granting a new trial is, of course, effectively unreviewable if the new trial is held before the appellate court has an opportunity to determine whether a new trial could or should have been granted. Orders suppressing evidence in criminal cases or reducing criminal charges are in most cases effectively unreviewable after trial because double jeopardy protections will prevent a retrial using the suppressed evidence or under a higher charge. All three kinds of review would be called collateral order review if Idaho courts used the federal terminology.

procedural rules and policies can be preempted in order to protect a substantial federal right. For example, *Felder* set aside a Wisconsin notice-of-claim requirement on the grounds that it impermissibly burdened a § 1983 plaintiff's case:

> [W]here state courts entertain a federally created cause of action, the "federal right cannot be defeated by the forms of local practice." The question . . . is essentially one of pre-emption: is the application of the State's notice-of-claim provision to § 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead " 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' "? Under the Supremacy Clause . . . , "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." Because the notice-of-claim statute . . . conflicts in both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is preempted when the § 1983 action is brought in a state court.

487 U.S., at 138, 108 S. Ct., at 2306-07 (citations omitted). The Court here has a situation like *Felder's*, except this time the defendants' rights are lost. The Idaho Supreme

Court's dismissal of Petitioners' appeal conflicts with the federal policy of protecting defendants' qualified immunity rights, and it will frequently and predictably produce different outcomes based solely on whether the defense is asserted in state or federal court. Therefore, the Supremacy Clause demands that the Idaho appellate rule must fall.

Felder was based on a line of cases in which this Court had set aside State procedural rules or policies that too heavily burdened the federal rights at stake. Much of the earlier precedent involved cases brought under FELA, the most significant of which was *Dice v. Akron, C.&Y.R.R.*, 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952). *Dice* held that a factual issue in a FELA case tried in Ohio state courts had to be sent to a jury and not tried by a judge (which would have been the case under Ohio law) because state procedure had to yield to Congress's prescription that the particular issues in question were to be tried by a jury. *Id.*, at 363, 72 S. Ct., at 315. Other FELA cases include *El Paso & N.R.Co. v. Gutierrez*, 215 U.S. 87, 92, 30 S. Ct. 21, 23, 54 L. Ed. 106 (1909) (rejecting a territorial statute's notice of claim requirement before bringing a FELA action); *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 512, 35 S. Ct 865, 868, 59 L. Ed. 1433 (1915) (holding that a state rule that plaintiff must prove that he was not contributorily negligent cannot apply in a FELA action brought in state court because Congress preferred the federal rule that the defendant must prove the plaintiff's contributory negligence); and *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1949) (rejecting a Georgia pleading rule to construe pleadings most strongly against the pleader that resulted

in the dismissal of a federal lawsuit under pleading standards not applicable to FELA).

In addition to FELA cases, in *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143 (1923), the Court refused to let a state apply its local practice that waived a federal venue defense because the waiver defeated the federal defense. And, in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942), a state court action under the Jones Act, this Court rejected a State policy placing on the plaintiffs the burden of proof regarding the validity of releases:

> The source of the governing law applied is in the national, not the state, government. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right originates. . . . [I]n trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

Id., at 245, 62 S. Ct., at 251 (footnotes omitted).[13]

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[13] While the following two cases were not initiated in state court, in *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982), this Court held that

When this Court set aside the Wisconsin notice-of-claim requirement in *Felder*, it expressed several concerns. One was that the notice-of-claim requirement burdened a substantial federal right in a manner not present in federal court. 487 U.S., at 141, 108 S. Ct., at 2308. Another was that the notice-of-claim requirement stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*, at 151, 108 S. Ct., at 2313. A further concern was that the notice-of-claim requirement undermined uniformity; it would "frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim was asserted in state or federal court." *Id.*, at 141, 108 S. Ct., at 2308. Also, the notice-of-claim statute discriminated against a federal right because tort plaintiffs in Wisconsin normally had two years to file their claims, not merely four months. *Id.*, at 141-42, 108 S. Ct., at 2308. Each of these four concerns is also present here.

First, a state court's denial of an immediate appeal burdens the federal immunity. Indeed, it does more than merely burden the right to avoid the burdens of litigation and trial, it extinguishes them. In *Felder*, the notice-of-claim requirement, while it burdened a federal right at stake, could be fulfilled. Here, if a trial court rules erroneously and an immediate appeal is denied, the immunity against trial and discovery is lost, and, unlike the

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exhaustion of state administrative remedies could not serve as a prerequisite to a § 1983 claim, and in *Burnett v. Gratton*, 468 U.S. 42, 104 S. Ct. 2924, 82 L. Ed. 2d 36 (1984), this Court determined a six-month state statute of limitations could not be applied to a § 1983 claim.

notice-of-claim requirement, there are no other steps the § 1983 defendants could have taken to retrieve or protect the right. The entitlement is defeated simply because of the forum in which the litigation was entertained.

Second, it is also apparent that the denial of a right of appeal from rejection of a qualified immunity motion is an obstacle to implementing Congressional policy of continuing qualified immunity. The qualified immunity defense is crucial to state and local government generally. As this Court recognized in *Mitchell*, 472 U.S., at 525, 105 S. Ct., at 2815, the quick resolution of § 1983 claims protects state and local government from the cost and disruption of its public officers undergoing discovery and trial. Also, by protecting the reasonable decisions and actions of public officers, their independent exercise of discretion is not chilled, and the public interest is better served. *Id.* In state courts where the qualified immunity entitlement is undermined or lost, so too is the ability of state or local government to serve the public needs.

When a state court undermines or eliminates the benefits of qualified immunity, a Congressional policy is defeated. Congress "[took] common-law principles into account in providing certain forms of absolute and qualified immunity" in enacting 42 U.S.C. § 1983. *Howlett*, 496 U.S., at 383, 110 S. Ct., at 2446. Likewise, "the elements of, and the defenses to, a federal cause of action are defined by Federal law," *id.*, at 375, 110 S. Ct., at 2442, and state courts cannot "nullify for their own people the legislative decisions that Congress has made on behalf of all the People," *id.*, at 383, 110 S. Ct., at 2447. Just as Congress intended a remedial purpose in enacting § 1983, Congress also made the decision that qualified immunity would be a federal defense to a § 1983 claim. It did so because of

the belief that "the public interest requires decisions and action to enforce laws for the protection of the public" and that "[i]mplicit in the idea that officials have some immunity – absolute or qualified – for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide to act at all." *Scheuer v. Rhodes*, 416 U.S. 232, 241, 242, 94 S. Ct. 1683, 1689, 1689, 40 L. Ed. 2d 90 (1974). When a state court system hears § 1983 claims and refuses to proceed in a manner that protects the federal qualified immunity defense, it undermines or eliminates the Congressional policy behind the decision to allow qualified immunity and defeats Congressional intent.

Third, the Idaho Supreme Court's decision to reject an immediate appeal of a trial court's denial of a qualified immunity motion creates a different outcome in § 1983 litigation depending upon the forum in which the case proceeds, state or federal district court. In *Felder*, 487 U.S., at 153, 108 S. Ct., at 2314, this Court was concerned with principles of uniformity in § 1983 litigation, holding that a "[state] law that predictably alters the outcome of § 1983 claims depending solely on whether they were brought in state or federal court within the same State is obviously inconsistent with the federal interest in intrastate uniformity." Here, if a state trial court erroneously denies a qualified immunity motion, whether or not that entitlement is irretrievably lost depends solely on the forum in which the case is proceeding. This creates inconsistency not only between federal and state forums, but also between those state forums that allow an immediate appeal and those that do not. In those States, like Idaho,

in which immediate appeal is denied, the state forum can provide a windfall for § 1983 plaintiffs who are the beneficiaries of erroneous rulings denying qualified immunity motions.

This issue becomes more marked when the burgeoning number of § 1983 claims is considered. In 1961, fewer than 300 cases were brought in federal court under all the civil rights acts. Twenty years later, in 1981 alone, nearly 32,000 suits were filed. P. Low and J. Jeffries, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS, p. 854 (1987). Every state court system today hears § 1983 cases. *Howlett*, 496 U.S., at 378, n.20, 110 S. Ct., at 1044, n.20; see Appendix I of this brief. This escalating number of cases creates a pressing need for uniformity in § 1983 litigation. When state courts do not respect the full scope of federal § 1983 defenses, the incentive for removal of cases to federal courts is enhanced: "More importantly, were we to withhold the right of appeal in courts of this Commonwealth, the practical effect would be to ensure that a large number of suits under § 1983 would be removed to federal court." *Breault v. Chairman of the Board of Fire Comm. of Springfield*, 401 Mass. 26, 31, n.6, 513 N.E.2d 1277, 1281, n.6 (1987).

Fourth, as in *Felder*, Idaho's policy discriminates against a federal right. The Idaho Supreme Court exercises appellate jurisdiction over a variety of pretrial orders that are similar to collateral orders under federal law. See I.A.R. 11. The Idaho Supreme Court thus hears interlocutory appeals from a variety of pretrial orders, and it has the adequate and appropriate appellate jurisdiction to hear this case. Under the principles articulated in *Felder* and *Howlett*, the Idaho Supreme Court should

exercise its appellate jurisdiction and proceed in a manner that protects the substantial federal right at stake here.

Finally, there is another sort of inequality not addressed in *Felder* or *Howlett* that will be created if the Idaho Supreme Court is allowed to dismiss an immediate appeal of denial of a qualified immunity motion – the lack of a level playing field between § 1983 plaintiffs and § 1983 defendants. Dismissal of an immediate appeal following a trial court denial of a qualified immunity motion places § 1983 defendants sued in state court at a distinctively unfair disadvantage relative to § 1983 plaintiffs. Defendants lose the benefit of their most important federal defense merely because of the forum in which the action is entertained, while under *Felder* and *Howlett* all elements of plaintiffs' federal claims are protected regardless of state rules of law that might otherwise benefit defendants. The principles articulated in *Felder* and *Howlett* should apply neutrally to both plaintiffs and defendants. State procedures are pre-empted to protect the elements of the federal claim, so State procedures should also be pre-empted to protect the benefits of a federal defense. Petitioners ask only that *Felder* and *Howlett* not be applied in a one-sided manner, but that both § 1983 plaintiffs and defendants benefit from their holdings.

CONCLUSION

The Court should:

(a) hold that Petitioners have a right to appeal to the Idaho Supreme Court from the Idaho district court's denial of their qualified immunity motion in a case brought under 42 U.S.C. § 1983,

(b) reverse the Idaho Supreme Court's order dismissing Petitioners' appeal from the Idaho district court's denial of their qualified immunity motion, and

(c) remand the case to the Idaho Supreme Court for proceedings consistent with the Court's holding.

Respectfully submitted,

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APPENDIX I

Examples of Reported Appellate Decisions of the Fifty States and the District of Columbia in Which the Appellate Court Considered Issues Under 42 U.S.C. § 1983

Alabama: *Boyett by Boyett v. Tomberlin*, 678 So. 2d 124 (Ala. Civ. App. 1995), *cert. denied* (1996).

Alaska: *Hildebrandt v. City of Fairbanks*, 863 P.2d 240 (Alaska 1993).

Arkansas: *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992).

Arizona: *Kerr v. Waddell*, 185 Ariz. 457, 916 P.2d 1173 (Ariz.Ct.App. 1996).

California: *Martinez v. County of Los Angeles*, 47 Cal. App. 4th 334, 54 Cal. Rptr. 2d 772 (1996).

Colorado: *Freedom from Religion Foundation, Inc. v. Romer*, 921 P.2d 84 (Colo.Ct.App. 1996).

Connecticut: *Jones v. Forst*, 41 Conn. App. 341, 675 A.2d 922 (1996).

Delaware: *Heaney v. New Castle County*, 672 A.2d 11 (Del. 1995).

District of Columbia: *Walton v. District of Columbia*, 670 A.2d 1346 (D.C. App. 1996).

Florida: *Jacobi v. City of Miami Beach*, 678 So. 2d 1365 (Fla.Dist.Ct.App. 1996).

Georgia: *Mattox v. Bailey*, 221 Ga. App. 546, 472 S.E.2d 130 (1996).

Hawai'i: *Aged Hawaiians v. Hawaiian Homes Com'n*, 78 Hawai'i 192, 891 P.2d 279 (1995), *cert. denied* ___ U.S. ___, 116 S. Ct. 77, 133 L. Ed. 2d 36 (1995).

Idaho: *Rincover v. Department of Finance*, 128 Idaho 653, 917 P.2d 1293 (1996).

Illinois: *Grassini v. DuPage Tp.*, 279 Ill. App. 3d 614, 665 N.E.2d 860 (1996).

Indiana: *Myers v. Moyars*, 667 N.E.2d 1120 (Ind.Ct.App. 1996).

Iowa: *Teague v. Mosley*, 552 N.W.2d 646 (Iowa 1996).

Kansas: *Sheila A. by Balloun v. Whiteman*, 259 Kan. 549, 913 P.2d 181 (1996).

Kentucky: *Belcher v. Kentucky Parole Bd.*, 917 S.W.2d 584 (Ky.Ct.App. 1996).

Louisiana: *Blanchard v. City Parish of East Baton Rouge*, 674 So. 2d 317 (La.App. 1996), *writ denied*, 679 So. 2d 443 (La. 1996).

Maine: *Rippett v. Bemis*, 672 A.2d 82 (Me. 1996).

Maryland: *Maryland Reclamation Associates, Inc. v. Harford County*, 342 Md. 476, 677 A.2d 567 (1996).

Massachusetts: *Parsons v. Mobile Home Park Rent Control Bd. of Chicopee*, 423 Mass. 631, 670 N.E.2d 179 (1996).

Michigan: *Steele v. Department of Corrections*, 215 Mich. App. 710, 546 N.W.2d 725 (1996).

Minnesota: *Carter v. Peace Officers Standards and Training Bd.*, 547 N.W.2d 431 (Minn.Ct.App. 1996).

Mississippi: *Bilbo v. Thigpen*, 647 So. 2d 678 (Miss. 1994).

Missouri: *Moore v. City of Park Hills*, 924 S.W.2d 301 (Mo.Ct.App. 1996).

Montana: *ISC Distributors, Inc. v. Trevor*, 273 Mont. 185, 903 P.2d 170 (1995).

Nebraska: *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994).

Nevada: *Cummings v. Charter Hosp. of Las Vegas, Inc.*, 111 Nev. 639, 896 P.2d 1137 (1995).

New Hampshire: *Kerouac v. Town of Hollis*, 139 N.H. 554, 660 A.2d 1080 (1995).

New Jersey: *C.P. by J.P. v. Township of Piscataway Bd. of Educ.*, 293 N.J. Super. 421, 681 A.2d 105 (1996).

New Mexico: *Silva v. Town of Springer*, 121 N.M. 428, 912 P.2d 304 (Ct. App. 1996), *cert. denied*, 121 N.M. 375, 911 P.2d 883, and 121 N.M. 444, 913 P.2d 251 (1996) (table).

New York: *Sager v. Rochester General Hosp.*, 647 N.Y.S.2d 408 (N.Y. Sup Ct. 1996).

North Carolina: *Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 471 S.E.2d 342 (1996).

North Dakota: *Frey v. City of Jamestown*, 548 N.W.2d 784 (1996).

Ohio: *Piphus v. Blum*, 108 Ohio App. 3d 218, 670 N.E.2d 518 (1995).

Oklahoma: *Washington v. State ex rel. Dept. of Corrections*, 915 P.2d 359 (Okla. 1996).

Oregon: *Butler v. State, Dept. of Corrections*, 138 Or. App. 190, 909 P.2d 163 (1995).

Pennsylvania: *Bell Atlantic Mobile Systems, Inc. v. Zoning Hearing Bd. of Tp. of O'Hara*, 676 A.2d 1255 (Pa.Commw.Ct. 1996).

Rhode Island: *Dyson v. City of Pawtucket*, 670 A.2d 233 (R.I. 1996), *cert denied*, ___ U.S. ___, 116 S. Ct. 1682, 134 L. Ed. 2d 784 (1996).

South Carolina: *Brown v. Evatt*, 470 S.E.2d 848 (S.C. 1996).

South Dakota: *Wolff v. Secretary of South Dakota Game, Fish and Parks Dept.*, 544 N.W.2d 531 (S.D. 1996).

Tennessee: *Davis v. McClaran*, 909 S.W.2d 412 (Tenn. 1995), *cert. denied*, ___ U.S. ___ 116 S. Ct. 1370, 134 L. Ed. 2d 535 (1996).

Texas: *Emerson v. Borland*, 927 S.W.2d 709 (Tex.Ct.App. 1996).

Utah: *E.M. Through S.M. v. Briggs*, 922 P.2d 754 (Utah 1996).

Vermont: *Hebert v. State*, 679 A.2d 887 (Vt. 1996).

Virginia: *Glasco v. Ballard*, 249 Va. 61, 452 S.E.2d 854 (1995).

Washington: *Kalmas v. Wagner*, 82 Wash. App. 105, 915 P.2d 546 (1996).

West Virginia: *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995).

Wisconsin: *Gray v. Marinette County*, 546 N.W.2d 553 (Wis.Ct.App. 1996), *review denied*, 549 N.W.2d 735 (Wis. 1996) (table).

Wyoming: *Johnson v. Griffin*, 922 P.2d 860 (Wyo. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 402, 136 L. Ed. 2d ___ (1996).

APPENDIX II

Examples of Procedural Statutes, Rules or Case Law in Which the Appellate Courts of the Fifty States and the District of Columbia Consider on Appeal Pre-Judgment Interlocutory Orders

Alabama: See Alabama Code § 12-1-11 Contempt; appeal of order (order of contempt appealable); § 12-22-21 Statute of limitations (appeal may be taken for a variety of judgments or interlocutory orders in probate matters); Alabama Rules of Appellate Procedure 4(a)(1) (refers to both appealable judgments and orders); *Ex parte Franklin County Dept. of Human Resources*, 674 So. 2d 1277 (Ala. 1996) (writ on mandamus used to review denial of qualified immunity motion in § 1983 case); *Titan Indem. Co. v. Riley*, 679 So. 2d 701 (Ala. 1996) (interlocutory appeal taken to decide scope of insurance coverage before trial).

Alaska: See Alaska Statutes § 09.25.330. Order subject to review (order denying claim of privilege of public officials or reporters shall be subject to review); Alaska Rules of Appellate Procedure, Rule 204(b), as adopted by Laws 1995, c. 79, § 17, effective July 1, 1995, as amended by the Alaska Supreme Court, effective July 15, 1996 (refers to party appealing from a final *order* or judgment.); Alaska Rules of Appellate Procedure, Rule 210(c)(2)(ii) (refers to the judgment or interlocutory order from which the appeal is taken); *State v. 4.62 Acres, More or Less*, 704 P.2d 1340 (Alaska 1985) (interlocutory appeal granted from order that state must conduct exploratory drilling on property that it proposed to condemn to see whether property held gold deposits).

Arizona: See Arizona Statute § 12-2101. Judgments and orders which may be appealed (several categories of appealable interlocutory orders listed, including

"[f]rom any order affecting a substantial right made in any action when the order in effect determines the action and prevents judgment from which an appeal might be taken, and from orders granting or denying a new trial, granting or denying an injunction, dissolving or refusing to dissolve an attachment or a garnishment, etc.); *Henke v. Superior Court of State of Ariz. In and For County of Maricopa*, 161 Ariz. 96, 100, 775 P.2d 1160, 1164 (Ariz. App. 1989) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases).

Arkansas: See Arkansas Rules of Appellate Procedure – Civil, Rule 2(a) (appeal "may be taken from 1. [a] final judgment *or decree* entered by the trial court"; "4. [a]n order which strikes out an answer, or any part of an answer, or any pleading in an action;" and several other categories of interlocutory orders); *Virden v. Roper*, 302 Ark. 125, 128, 788 S.W.2d 470, 472 (1990) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases).

California: See California Code of Civil Procedure 904.1 Superior Courts; Appealable Judgments and Orders (orders granting a motion to quash service, motion to dismiss for forum non-conviens, a new trial, etc., all made appealable); *Samuel v. Stevedoring Services of America*, 24 Cal. App. 4th 414, 417-18, 422-23, 29 Cal. Rptr. 2d 420, 422-23, 425-26 (1994), *review denied* (California court of appeals acknowledges state law collateral order doctrine of appealability of orders that "direct the payment of money by appellant or the performance of an act by or against him [or her]," but rejects application of collateral order doctrine based upon a federal law claim of immunity from

suit in motion to dismiss (although it may be available at judgment on the pleadings or summary judgment stage of proceedings)).

Colorado: See Colorado Rev. Stat. § 16-12-102(2) (order suppressing evidence or a confession is immediately appealable); Colorado Appellate Rule 4 (allows an appeal from a final judgment, decree or order); *City of Lakewood v. Brace*, ___ Colo. ___, ___, 919 P.2d 231, 241 (1996) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases by virtue of Supremacy Clause).

Connecticut: See *State v. Bell*, 179 Conn. 98, 425 A.2d 574 (1979) (applying collateral order doctrine to determine that trial court's determination that juvenile should be tried as adult and not as youthful offender was appealable order because that order conclusively determines rights of parties and further proceedings cannot affect them).

Delaware: See Rules of the Supreme Court, Rule 42 (allows an interlocutory appeal if the trial court determines a substantial issue, establishes a legal right and one or more of the enumerated criteria are met); *Gannett Co., Inc. v. State*, 565 A.2d 895, 899 (1989) (collateral order doctrine applied to review order holding journalist in contempt in criminal proceeding).

District of Columbia: See District of Columbia Code 11-721(a)(1) (court of appeals has jurisdiction over appeals from "final orders and judgments" and from certain interlocutory orders regarding injunctions, receivers, and real property); Rules of the District of Columbia Court of Appeal, Rule 5 (interlocutory appeal by permission, if it will materially advance the litigation); *Bible Way Church of Our Lord Jesus Christ of Apostolic Faith of Washington, D.C. v. Beards*, 680 A.2d 419, 425 (D.C. App. 1996) (collateral order

doctrine recognized to apply to orders that "have a final and irreparable effect on important rights of the parties" (internal punctuation omitted)).

Florida: See Rule of Appellate Procedure 9.110(3) (review of orders granting a new trial in civil or criminal case); Rule 9.140 (appeal may be had from orders suppressing confessions or evidence obtained by search and seizure or adjudicating a defendant incompetent or insane); *Tucker v. Resha*, 648 So. 2d 1187, 1189 (Fla. 1994) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases).

Georgia: See Rules of the Court of Appeals, Rule 30 (appeal allowed if issue is dispositive of the case, order appears erroneous and will probably cause a substantial error at trial or the establishment of precedent is desirable); *Moore v. Bank of Fitzgerald*, 266 Ga. 190, 191, 465 S.E.2d 445, 446 (1996) (cancellation of notice of lis pendens is collateral order from which immediate appeal may be taken).

Hawai'i: See Hawai'i Revised Statutes 804-51 (providing for appeal from forfeiture of bond in criminal case); Hawai'i Rules of Appellate Procedure, Rule 34 (formal testacy orders and Rule 54(b) certified orders are appealable); *Shimote v. Vincent*, 80 Hawai'i 96, 905 P.2d 71 (Haw. App. 1995), *cert. denied*, 80 Hawai'i 187, 907 P.2d 773 (Haw. 1995) (order denying motion to stay trial pending arbitration is appealable collateral order).

Idaho: See Idaho Appellate Rule 11 (final judgments, orders and decrees appealable and also orders granting a new trial, suppressing evidence or reducing a criminal charge over the prosecutor's objection); Rule 12 (appeal by permission from interlocutory orders which involve a controlling question of law

about which there is substantial grounds for difference of opinion and in which an immediate appeal will materially advance the orderly resolution of the litigation); *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1986) (plaintiff brought interlocutory appeal from district court's order to submit to remittitur of jury verdict or to new trial).

Illinois: See Illinois Const. Art. VI, § 6 Appellate Court Jurisdiction (final judgments are appealable as a matter of right and "[t]he Supreme Court may provide by rule for appeals to the Appellate Court from other than final judgments of Circuit Courts"); Illinois Civil Appeals Rules 306 (permissive appeal from interlocutory orders granting a new trial, from various orders on venue, from disqualification of attorney, etc.), 307 (appeal as matter or right from certain interlocutory orders regarding injunctions, appointment of receivers, possession of property, terminating parental rights in adoption proceedings, etc.); 308 (permissive appeal of interlocutory orders that "involve[ ] a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation"); *Doe v. Doe*, 282 Ill.App.3d 1078, 668 N.E.2d 1160 (1996) (trial court order prohibiting plaintiff from disclosing her name or defendant's name in any pleading is appealable interlocutory order because it is an injunction).

Indiana: See Indiana Code § 35-38-4-2(6) and Appellate Rule 4B(6) (appeal from an interlocutory order if the appellate court finds on petition and the trial court certifies that the appellant will suffer substantial injury or expense if the appeal is delayed, the order determines a substantial question of law, the early

determination of which will promote orderly disposition of the case or the remedy by appeal after judgment is otherwise inadequate); *American Cyanamid Co. v. Stephen*, 600 N.E.2d 1387, 1388 (Ind. App. 1992), *transfer denied* (class certification orders are final and appealable collateral orders – finality is determined by case law and rules).

Iowa: See Iowa Rules of Appellate Procedure, Rule 1 (appellate review of order granting new trial); Rule 2 (permissive appeal of interlocutory order if ruling involves substantial rights, will materially impact a final decision and a determination before trial will better serve the interests of justice); *Kulish v. West Side Unlimited Corp.*, 545 N.W.2d 860 (Iowa 1996) (interlocutory appeal granted to consider dismissal of parents' claim of loss of consortium in wrongful death case).

Kansas: See Kansas Stat. Ann. § 22-3603 (state can appeal an order quashing a search warrant, suppressing evidence or suppressing a confession); § 60-2102 (appeal as a matter or right from certain orders regarding provisional remedies, injunctions, or receiverships, and from "final decisions"); *Parker v. Volkswagenwerk Aktiengesellschaft*, 245 Kan. 580, 584, 781 P.2d 1099, 1103-04 (1989) ("final decision" language of Kansas statute identical to federal appellate statute, and order disqualifying attorney was final decision under collateral order doctrine under Kansas law and immediately appealable).

Kentucky: See Kentucky Revised Statutes 22A.020 Jurisdiction; Appeal Procedures (appeal may be taken as a matter or right from "any conviction, final judgment, order or decree" and "interlocutory orders . . . in civil cases [may be reviewed] as authorized by rules promulgated by the Supreme Court"); 416.620

Trial of Exceptions to Interlocutory Judgment; Questions as to Compensation to Be Tried by Jury; Appeals (authorizes appeal from interlocutory order allowing petitioner to take possession of property in condemnation proceedings); *Commonwealth v. Smith*, 898 S.W.2d 496 (Ky.App. 1995) (interlocutory appeal from suppression of evidence); *Ratliff v. Fiscall Court of Caldwell County*, 617 S.W.2d 36 (Ky. 1981) (condemnee has right to appeal interlocutory order giving condemnor right to take property).

Louisiana: See Louisiana Code Civ. Proc. art. 2083 (proceedings in appellate courts) (an appeal may be taken "from an interlocutory judgment which may cause irreparable injury"); *Butler v. Overnite Transp. Co., Inc.*, 444 So. 2d 676 (La. App. 1984) (court applied collateral order doctrine and analysis to hold that interlocutory order to pay attorney's fees was reviewable under this provision of art. 2083).

Maine: See 4 Maine Revised Statutes § 57 Jurisdiction; disposition of cases; technical errors in pleading and procedure (The Supreme Judicial Court's jurisdiction includes "questions of law arising on reports of cases, including interlocutory orders or rulings of such importance as to require, in the opinion of the justice, review by the law court before any further proceedings in the action"); *Vogt v. Churchill*, 679 A.2d 522, 524 (Me. 1996) (collateral order exception allows appeal from order granting or denying an attachment); *Lyons v. City of Lewiston*, 666 A.2d 95, 99 (Me. 1995) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases and Maine rules of procedure held inapplicable).

Maryland: See Maryland [Cts. & Jud. Proc.] Code Ann. § 12-303(3)(iii) (order denying interlocutory injunction is immediately appealable); *Montgomery County*

v. Stevens, 337 Md. 471, 476, 654 A.2d 877, 879 (1995) (issue whether high ranking officer of county was subject to deposition appealable under collateral order doctrine); *Parrott v. State*, 301 Md. 411, 483 A.2d 68 (1984) (Maryland applies collateral order doctrine to constitutional rights).

Massachusetts: See Rules of Criminal Procedure, Rule 15 (either side can appeal to a single justice from a determination regarding the suppression of evidence, state can appeal the denial of a transfer of a delinquency proceeding); *Breault v. Chairman of Bd. of Fire Com'rs of Springfield*, 401 Mass. 26, 31, 513 N.E.2d 1277, 1280-81 (1987), cert. denied sub nom. *Forastiere v. Breault*, 485 U.S. 906, 108 S. Ct. 1078, 99 L. Ed. 2d 237 (1988) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases).

Michigan: See Michigan Compiled Laws 600.308. Court of appeals; jurisdiction (court of appeals has jurisdiction of orders of probate court made appealable by probate code); Michigan Court Rule 7.205 (permissive appeal to the court of appeals from interlocutory order if appellant would suffer substantial harm by awaiting final judgment); *Carleton Sportsman's Club v. Exeter Tp.*, 217 Mich. App. 195, 550 N.W.2d 867 (1996) (interlocutory appeal granted to clarify the law of appeal from certain zoning decisions).

Minnesota: See Rules of Civil Appellate Procedure, Rule 103.03 (appeal to court of appeals allowed from order that grants, refuses or dissolves an injunction, grants a new trial, if new trial is based on error in law, or denies a summary judgment or motion to dismiss, if the trial judge certifies that the question presented is important and doubtful); *Anderson v. City of Hopkins*, 393 N.W.2d 363, 364 (Minn. 1986) (collateral order doctrine adopted for review of

denial of qualified immunity motions in § 1983 cases).

Mississippi: See Miss. Rules of Appellate Procedure, Rule 5 (permissive review of interlocutory order if a substantial basis exists for difference of opinion on a question of law and review will materially advance the litigation or protect a party from substantial harm or resolve an issue of general importance to the administration of justice); *Beckwith v. State*, 615 So. 2d 1134, 1140-41 (Miss. 1992), *cert. denied*, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993) (court reviews its precedents that collateral order doctrine is applied in three kinds of criminal cases: denial of motion to reduce bond, to dismiss on double jeopardy grounds, and to dismiss on speech and debate grounds).

Missouri: See Vernon's Annotated Missouri Statutes 512.020. Who may appeal (appeal allowed from order granting a new trial and certain orders regarding injunctions); *State v. Smith*, 926 S.W.2d 689 (Mo. App. 1996) (interlocutory appeal from suppression of evidence).

Montana: See Montana Rule of Appellate Procedure, Rule 1 (appeal from an order granting a new trial, refusing to permit a class action, granting or refusing to grant an injunction, changing or refusing to change county in which case will be tried, ordering delivery or transfer of property, appointing or refusing to appoint a receiver, or, in partition actions, an order determining the rights of the parties); Mont. Code Ann. § 46-20-103 (state can appeal from order granting a new trial, quashing an arrest or search warrant or suppressing evidence or a confession); *McDonald v. Washington*, 261 Mont. 392, 862 P.2d 1150 (1993) (interlocutory appeal taken from class certification order).

Nebraska: See Nebraska Rev. Stat. § 29-116 (state can appeal order suppressing statements); Nebraska Rev. Stat. § 29-824 (state can appeal order suppressing evidence); Nebraska Rev. Stat. § 25-1902 (final order defined to include "[a]n order affecting a substantial right in an action"); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990) (section 25-1902 construed to make collateral orders appealable).

Nevada: See Nevada Rules of Appellate Procedure, Rule 3A (appeal of order granting a new trial, granting or refusing an injunction, appointing or refusing to appoint a receiver, changing or refusing to change the place of trial, or resolving rights in a partition action); *Consumers League of Nevada v. Southwest Gas Corp.*, 94 Nev. 153, 576 P.2d 737 (1978) (interlocutory appeal allowed from order denying consumer's request for attorneys' fees in connection with public utility rate refund).

New Hampshire: See Supreme Court Rules, Rule 8 (Supreme Court may accept an interlocutory appeal involving a question of law where there is a substantial basis for disagreement and interlocutory review would materially advance the litigation); *Richardsons v. Chevrefils*, 131 N.H. 227, 231-32, 552 A.2d 89, 92 (1988) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases).

New Jersey: See Rules Governing Appellate Practice 2:2-4 (appellate division may grant leave to appeal interlocutory order in the interest of justice); Rules Governing Civil Practice 4:42-2 (appeal following certification by trial judge when there is no just reason for delay); Rules Governing Civil Practice 4:53-1 (order appointing receiver is final for purposes of appeal); Rules Governing Practice in the Chancery Division 5:8-6 (final custody order in

bifurcated family action); and Rule 5:10-6(order entered on preliminary hearing on adoption); *Elmora Hebrew Center, Inc. v. Fishman*, 125 N.J. 404, 593 A.2d 725 (1991) (court explains that interlocutory appeal taken to determine which part of controversy was religious and which part contractual).

New Mexico: See Rules of Appellate Procedure, Rule 12-203 (interlocutory appeal allowed on controlling issue of law where there is a substantial basis for difference of opinion and immediate appeal would materially advance the ultimate determination); *Carrillo v. Rostro*, 114 N.M. 607, 615, 845 P.2d 130, 137 (1992) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases)

New York: See New York Const., Art. VI, § 6 ("The jurisdiction of the court of appeals shall be limited to the review of questions of law . . . , or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved"); McKinney's Criminal Procedure Law § 450.20 (orders reducing counts of indictment or suppressing evidence immediately appealable); *Zack v. Zack*, 183 A.D.2d 382, 590 N.Y.S.2d 632 (1992) (immediate appeal allowed over interlocutory divorce judgment).

North Carolina: See North Carolina Statute 7A-27 Appeals of right from the courts of the trial divisions (interlocutory orders that "affect[ ] a substantial right" and that grant or refuse a new trial are appealable as of right); *Corum v. University of North Carolina through Bd. of Governors*, 330 N.C. 761, 767, 413 S.E.2d

276, 280, *cert. denied*, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431, (1992) (*Mitchell* cited for review of denial of qualified immunity motions in § 1983 cases).

North Dakota: See North Dakota Century Code § 28-27-02 (appealable orders include "[a]n order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;" orders granting or denying injunctions or new trials; and "[a]n order which involves the merits of an action or some part thereof;"); *Jarmin v. Shriners Hospitals for Crippled Children*, 450 N.W.2d 750, 751, n.3 (N.D. 1990) (order removing petitioner from position as personal representative of estate is appealable because it is independent of proceeding for final accounting).

Ohio: See Ohio Revised Code § 2505.02 (orders vacating judgment or granting new trial are final orders appealable as of right) § 2505.03 ("[e]very final order, judgment, or decree . . . may be reviewed on appeal"); *In re Adoption of Greer*, 70 Ohio St. 3d 293, 293, 297, 638 N.E.2d 999, 1000, 1003 (1994) (order finding that putative father's consent was not necessary before taking up adoption petition was appealable interlocutory order because it precluded putative father from barring adoption).

Oklahoma: See 12 Oklahoma Statutes 952 (final orders, certain orders vacating provisional remedies, orders granting or denying injunctions, and orders granting or denying new trials are all appealable orders); *McLin v. Trimble*, 795 P.2d 1035, 1040 (Okla. 1990) (Supremacy Clause cited for decision to review denial of qualified immunity motions in § 1983 cases by original action in appellate court).

Oregon: See Oregon Revised Statutes § 19.010 (appealable judgments, decrees, and orders include interlocutory decrees for partition or sale of real property and orders granting new trial); *State v. Wright*, 97 Or. App. 401, 405, 776 P.2d 1294, 1297 (1989), review denied, 308 Or. 593, 784 P.2d 1100 (1989) (Table) (State may appeal pre-trial order to admit evidence under statute addressing admissibility of evidence of victim's past sexual behavior); *Vista Management, Ltd. v. Cooper*, 81 Or. App. 660, 662, 726 P.2d 974, 976 (1986) (judgment on foreclosure before final determination of related contract issues, although called interlocutory, is final order for purposes of appeal).

Pennsylvania: See Pennsylvania Rules of Appellate Procedure 313 ("An appeal may be taken as of right from a collateral order of an administrative agency or lower court."); *Hanson v. Federal Signal Corp.*, ___ Pa. Super. ___, ___, 679 A.2d 785, 787 (Pa. Super. 1996) (order denying class certification appealable under collateral order doctrine).

Rhode Island: See General Laws of Rhode Island 9-24-7 (appeal may be taken for orders granting an injunction, appointing a receiver, ordering sale of real or personal property, or ordering a new trial); *Thompson v. Thompson*, 642 A.2d 1160, 1161 (R.I. 1994) (interlocutory order in divorce proceeding awarding property, alimony, health insurance coverage and attorney's fees is appealable); *Silva v. Perkins Mach. Co.*, 622 A.2d 443, 444 (R.I. 1993) (denial of attorney's motion to withdraw from case is appealable interlocutory order).

South Carolina: See South Carolina Code of Laws § 14-3-330 (orders granting or denying a new trial, striking an answer or any part of it, granting or denying an injunction, or refusing the appointment

of a receiver are appealable); South Carolina Appellate Court Rule 201 (appeals may be taken from any final judgment or appealable order); *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993) (interlocutory orders regarding mode of trial – whether issue is one of law and presented to jury or one of equity and decided by judge – are immediately appealable).

South Dakota: See South Dakota Code § 15-26A-3 (orders granting new trial and granting or refusing an injunction are immediately appealable); *Green v. Clinic Masters, Inc.*, 272 N.W.2d 813 (S.D. 1978) (court hears appeal as right from interlocutory order granting injunction).

Tennessee: See Tennessee Rule of Appellate Procedure 3 (in criminal cases state may appeal from dismissal of indictment and remanding matter to juvenile court); *Fann v. Brailey*, 841 S.W.2d 833, 834 (Tenn. App. 1992), *appeal denied* (court considers appeal from denial of qualified immunity motion in § 1983 case even though order is not ordinarily appealable under local rule).

Texas: See Vernon's Texas Statutes and Codes, Civil Practice and Remedies Code § 51.014 (interlocutory orders appointing receiver, certifying or refusing to certify a class, granting or refusing an injunction, denying a government officer or employee's claim of immunity, or denying certain free speech/free press claims are appealable); Code of Criminal Procedure Art. 44.01 (state may appeal from orders dismissing any portion of an indictment, granting a new trial, and suppressing evidence); *Robinett v. Carlisle*, 928 S.W.2d 623 (Tex. App. 1996), application for writ of error pending (interlocutory appeal from denial of qualified immunity motion taken under § 51.014).

Utah: See Utah Rule of Criminal Procedure 26 (appeal may be taken from order suppressing evidence); *Bellonio v. Salt Lake City Corp.*, 911 P.2d 1294 (Utah App. 1996), *cert. denied*, 917 P.2d 556 (Utah 1996) (Table) (interlocutory appeal from trial court order denying municipality's motion to dismiss for failure to comply with tort claim filing requirements).

Vermont: See Vermont Rule of Appellate Procedure 5.1 (sets forth procedure to initiate appeal of collateral orders by motion before trial court); *Murray v. White*, 155 Vt. 621, 625-26, 587 A.2d 975, 977-78 (1991) (court applies collateral order analysis to rule that denial of qualified immunity motion in § 1983 case is appealable order).

Virginia: Code of Virginia § 8.01-626 (appeal available from grant or denial of injunction); § 19.2-398 (commonwealth may appeal dismissal of indictment or suppression of evidence); *Commonwealth v. Ramey*, 19 Va. App. 300, 450 S.E.2d 775 (1994) (statute giving commonwealth interlocutory right of appeal is not unconstitutional).

Washington: See Washington Rule of Appellate Procedure 2 (orders of public use and necessity in condemnation cases, orders granting or denying a motion for a new trial, and orders suppressing evidence all appealable); *State v. Ortiz*, 104 Wash. 2d 479, 706 P.2d 1069 (1985), *cert. denied*, 476 U.S. 1144, 106 S. Ct. 2255, 90 L. Ed. 2d 700 (1986) (opinion describes interlocutory appeals that preceded trial).

West Virginia: See West Virginia Code § 58-5-1 (appeal lies from final judgments, orders, or decrees, from orders dissolving or refusing to dissolve injunctions, from orders quashing or abating or refusing to quash or abate an attachment, and from orders granting a new trial); *Mitchem v. Melton*, 167 W. Va. 21, 29-32, 277 S.E.2d 895, 899-901 (1981) (case reviews several

categories of appealable interlocutory orders to hold that order refusing to certify a class in a § 1983 suit is an appealable order).

Wisconsin: See Wisconsin Statutes 808.03 (final judgments and final orders appealable as of right; interlocutory appeal allowed if appeal would materially advance the litigation or protect the petitioner from substantial or irreparable harm or clarify an issue of general importance in the administration of justice); *State v. Schoepp*, 554 N.W.2d 236 (Wis. App. 1996) (interlocutory appeal from order granting state's motion to quash defendant's subpoenas).

Wyoming: See Wyoming Rules of Appellate Procedure 1.05 (appealable orders include orders granting a new trial, granting or dissolving injunctions, appointing receivers); 13.02 (allows interlocutory appeals that involve controlling issue of law as to which there is a substantial basis for difference or opinion and in which an immediate appeal materially advances the litigation); *Park County v. Cooney*, 845 P.2d 346, 349 (Wyo. 1992), *cert. denied*, 510 U.S. 813, 114 S. Ct. 60, 126 L. Ed. 2d 30 (1993) (*Mitchell* cited for court's holding that denial of qualified immunity motion in § 1983 case is appealable order, even though denial of motion is not ordinarily appealable in other contexts).

Supreme Court, U.S.
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No. 96-292

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON and H. DEAN SUMMERS,

Petitioners,

v.

KRISTINE L. FANKELL,

Respondent.

On Writ of Certorari to the Supreme Court of the State of Idaho

---

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does federal law preempt state rules of appellate jurisdiction by requiring state courts adjudicating claims under 42 U.S.C. §1983 to adopt the federal collateral order doctrine and provide for an interlocutory appeal of right from a decision rejecting a claim of qualified immunity, even where state law does not authorize such an appeal?

PARTIES

In addition to the parties set forth in the brief for petitioners, the second amended complaint also named as a defendant Dyke Nally, the Superintendent of the Idaho State Liquor Dispensary, and his successors. Mr. Nally was sued solely in his official capacity for the purpose of obtaining injunctive relief, and thus was not among the petitioners seeking review of the qualified immunity issue raised by the instant petition.

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No. 96-292

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

MARIAN JOHNSON, *et al.*,
Petitioners,

v.

KRISTINE L. FANKELL,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Idaho

BRIEF FOR RESPONDENT

STATUTE AND RULE INVOLVED

Rule 12(a) of the Idaho Appellate Rules provides:

Permission may be granted by the Supreme Court to appeal from an interlocutory order or decree of a district court in a civil or criminal action . . . which is not otherwise appealable under these rules, but which involves a

> controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.

Section 1291 of 42 U.S.C. provides in pertinent part, "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF THE CASE

Statement of the Facts

This action arose out of an employment dispute at a state operated liquor store in a rural area of Idaho. As is true in a number of states, such as New Hampshire, private retailers in Idaho are not permitted to sell liquor, beer or wine for consumption off premises. Rather, such goods are sold only by or under the auspices of the Idaho State Liquor Dispensary, primarily at stores operated by the Dispensary and staffed by government employees. The events at issue in this case occurred at state operated liquor store #322 in Sandpoint, Idaho, a town of 5,300 located eight hours by car north of Boise.

Respondent was a long time employee of the State Liquor Dispensary; she was originally hired on July 10, 1980, and until her dismissal in April 1993 worked primarily in the Sandpoint store. Because of the peculiarities of Idaho law, respondent was designated as a "temporary" state employee for the first twelve years of this period.[1] In December 1991, respondent applied to alter her status to that of a permanent "classified" employee; after passing the applicable Idaho

[1]This classification limited the number of hours a year during which respondent could work to 1,385. Idaho Code §67-5302(31).

Personnel Commission examination, she was hired as a "probationary" classified employee on August 2, 1992. (J.App. 6, 17). This change in status did not affect her actual duties; she continued to work, as she had for years, as a liquor store stock clerk.

Some time after the start of this probationary period, petitioner Marian Johnson, the supervisor of the Sandpoint store, announced her intention to take a leave of absence. Petitioner Johnson sought to appoint as the acting store manager during this period a Mary Stirn, a personal friend of Johnson's. Agency practice, however, limited such appointments to persons who, like respondent, had passed the Idaho Personnel Commission examination. Respondent successfully objected to state officials in Boise that Stirn had never passed the requisite examination. As a result, respondent was appointed as the temporary store manager during Johnson's absence. (J.App. 6-7) Respondent held that position without incident for two months. From the beginning of her employment in 1980 until the spring of 1993, respondent regularly received satisfactory evaluations from her various supervisors.

Petitioner Johnson returned from her leave of absence on March 10, 1993. On March 25, 1993, Johnson prepared a negative written evaluation of respondent's job performance. (J.App. 7). The job evaluation form used required that respondent be given numerical ratings in a number of different areas. Although this new evaluation was lower than in the past, the actual total of the scores which respondent received was 55, which according to the form would have meant that respondent "Meets Expectations" and should "be certified to permanent status." However, petitioner Johnson, inadvertently or otherwise, incorrectly totalled the scores as below 54, and thus classified respondent as "Below Expectations." (J.App. 17, 51). Respondent filed a timely grievance to contest her performance score and evaluation; state officials, however, never responded to or processed the grievance. (J.App. 7, 37, 43-44, 55-56).

On April 7, 1993, petitioner Summers, then the

Personnel Director of the State Liquor Dispensary, notified respondent that she would be dismissed for failure to satisfactorily complete her initial probationary period. Respondent was fired on April 22, 1993. (J.App. 7, 17).

Proceedings Below

On April 11, 1995, respondent commenced this action in the Idaho District Court for Bonner County, pursuant to 42 U.S.C. §1983, seeking injunctive relief, including reinstatement, as well as damages. Damages were sought against four specific state officials, including petitioners Johnson and Summers, allegedly involved in respondent's dismissal. The injunctive relief was sought against a fifth defendant, the then Supervisor of the Liquor Dispensary, Dyke Nally, and his successors.[2] The complaint alleged two distinct violations of the Due Process Clause of the Fourteenth Amendment. First, respondent claimed that she had been deprived without due process of her property interest in her employment.[3] Second, she asserted that she had been denied procedural due process when state officials refused to process her grievance challenging

[2]Nally was added as a defendant in the Second Amended Complaint, in place of the State Liquor Dispensary, which was one of the original named defendants.

[3]Idaho classified probationary employees may only be terminated for failure to satisfactorily complete their entrance probationary period. *See* Idaho Code §67-5309(j). The statute "limits the reasons for which an employee may be discharged," *Mitchell v. Zilog*, 125 Idaho 709, 712, 874 P. 2d 520 (1994), even during the entrance probationary period. "Satisfactory performance" is a legislatively imposed limitation on the state agency's authority to terminate a probationary worker.

the March, 1993, evaluation. (J.App. 7-9)[4].

Petitioners moved to dismiss the complaint on a variety of grounds, asserting, *inter alia*, that the four defendants against whom damages had been sought were entitled to qualified immunity. Petitioners did not deny that the requirements of the Due Process Clause were themselves well established at the time when respondent was dismissed. *See Board of Regents v. Roth*, 408 U.S. 564 (1972). Rather, petitioners asserted that under *state* law at the time of respondent's dismissal it was not clear whether respondent was yet a permanent employee.

At the time of respondent's dismissal, Idaho law provided that a probationary employee would automatically become a permanent employee following "a probation period not to exceed six (6) months" plus thirty days, unless during that period the probationary employee received an unsatisfactory written evaluation. Idaho Code §67-5309(j). Respondent began her probationary period on August 2, 1992; the six month plus thirty day period expired on March 4, 1993, twenty-five days before the adverse evaluation. Petitioners contended, however, that when they dismissed respondent in April 1993 they "reasonably believed" that she had not yet achieved permanent status (J.App. 30), pointing to an Idaho Personnel Commission rule then in effect requiring probationary employees to serve 1040 hours in that status[5]. In the interim, however, the Idaho Supreme Court had declared invalid the rule in question, on the ground that it conflicted with the statutory six month limitation

[4]In *Brigham v. Department of Health and Welfare*, 106 Idaho 347, 679 P.2d 147 (1984), the Idaho Supreme Court had held that "probationary employees are entitled to the full range of procedural rights set forth in the [Personnel Commission] Act." 106 Idaho 350, 679 P. 2d 14. The right to file a grievance is one of the rights provided by the Act.

[5]Respondent had worked for 950.9 hours as of March 13, 1993, the date on which the period covered by her performance evaluation ended. (J. App. 17).

on probationary service.

> It is *not reasonable* . . . for the commission to construe "six months" to mean " . . . 1040 . . . hours of credited state service." . . . [The commission's] construction . . . contradicts the *clear* expression of the legislature. . . . The legislature has *clearly* indicated that the maximum period of probation for "all appointments" is six calendar months.

Hood v. Idaho Department of Health and Welfare, 868 P. 2d 479, 482, 125 Idaho 151 (1994)(Emphasis added).[6]

Petitioners submitted in support of their motion to dismiss a memorandum of counsel asserting that petitioners had acted "in reliance of [sic] Personnel Commission rules", citing the rule held invalid in *Hood*.[7] The single affidavit supporting that motion, however, contained no assertion that any such reliance had occurred; petitioners offered no affidavit or other evidence suggesting that at the time of the dismissal the petitioners actually knew that respondent had fewer than 1040 hours of probationary service when she received her adverse evaluation. In this Court, petitioners assert only that in the court below they "*argued* that they had reasonably relied upon the administrative rule" (P.Br. 6)(emphasis added), not that they ever adduced in that court any evidence in support of that argument.

On February 22, 1996, the Idaho District Court, treating the motion to dismiss as a motion for summary judgment,

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[6]The relevant state law was amended several months later to replace the six month rule with a 1040 hour rule.

[7]J.App. 30 (citing IDAPA 28.15.A.2.a).

denied the motion.[8] Petitioners then sought to take an interlocutory appeal limited to that portion of the order rejecting the qualified immunity claim. On April 23, 1996, the Idaho Supreme Court dismissed the appeal under Idaho Appellate Rule 11, "for the reason [that] it is not from a final order or judgment". (Pet. App. 1a). On May 23, 1996, that court denied petitioners' petition for rehearing. (Pet. App. 3a).

Defense Counsel have not sought to appeal with regard to respondent's claim for injunctive relief; that aspect of the litigation has been stayed by agreement of the parties. The factual issues which would be litigated regarding the monetary and injunctive claims are essentially the same. Thus petitioners, as the principal participants in the decision to dismiss respondent, will face discovery and the necessity of testifying at the trial of the equitable claim regardless of whether their qualified immunity defense is sustained prior to trial.

SUMMARY OF ARGUMENT

The right to take an interlocutory appeal recognized by *Mitchell v. Forsyth*, 472 U.S. 511 (1985), is not a requirement contained in section 1983, but an interpretation of the provisions of 28 U.S.C. §1291 regarding when a decision is "final." The specific result in *Mitchell* is an application of the federal collateral order doctrine, a gloss on section 1291 derived from this Court's decision in *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541 (1949).

That section 1983 itself contains no right to an interlocutory appeal whenever a qualified immunity defense has been rejected is demonstrated by *Johnson v. Jones*, 115 S.Ct.

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[8]The District Court granted the motion insofar as it sought dismissal of the claims against the Idaho State Liquor Dispensary. (J.App. 63). Defendant Nally was subsequently substituted as a defendant by agreement of the parties.

2151 (1995). *Johnson* refused to permit such an interlocutory appeal where the proffered qualified immunity defense had been rejected because of the existence of genuine issues of material fact, even though the defendants in *Johnson* would as a result have to take part in discovery and trial. The distinction between the results in *Mitchell* and *Johnson* derives from the nature of the collateral order doctrine applied in both.

Idaho, like many states, does not interpret its state procedural provisions to include a collateral order doctrine. That is due, at least in part, to the fact that the relevant Idaho and federal provisions contain different language. Section 1291 authorizes appeals of "final decisions"; Idaho Appellate Rule 11(a)(1), on the other hand, is limited to "[j]udgments, orders and decrees which are final." The decision of the Idaho Supreme Court interpreting Idaho Appellate Rule 11(a)(1) is binding on the federal courts.

The states may apply such neutral procedural provisions in adjudicating federal causes of action brought in state courts. "The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372 (1990). Laws which determine the allocation of responsibilities between trial and appellate judges are procedural in nature. *Gasperini v. Center for the Humanities, Inc.*, 116 S.Ct. 2211 (1996). Idaho Appellate Rule 11 does not discriminate against federal claims or federal litigants.

"This is a case about federalism." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). The interests protected by the qualified immunity doctrine are state interests. In structuring its judicial system, Idaho has chosen to give paramount consideration to the state's interest in avoiding the inconvenience and costs inherent in interlocutory appeals. That interest is particularly great because any interlocutory appeal in cases such as this would have to be heard by the Idaho Supreme Court, since Idaho has no intermediate appellate courts between the state District Court in which this case was filed and the state

Supreme Court.

ARGUMENT

I. INTRODUCTION

Idaho courts entertain federal claims under 42 U.S.C. § 1983, and apply federal substantive law in adjudicating such claims, including the federal law concerning qualified immunity defenses. Idaho, however, like every state court, limits appeals of interlocutory rulings, and Idaho's limitations on interlocutory appeals are not identical to the provisions governing federal appeals. Like several other states, Idaho law does not permit immediate appeals of right from rulings denying qualified immunity claims, although Idaho does allow permissive appeals from such rulings. The central issue presented by this action is whether the federal civil rights laws, despite state laws to the contrary, require the Idaho Supreme Court to hear an interlocutory appeal as of right regarding qualified immunity whenever a federal circuit court would hear such an appeal.

Although the cases in which interlocutory qualified immunity appeals would in practice be allowed under federal and Idaho procedure do overlap to a substantial degree, some interlocutory appeals permitted in the federal courts would not be possible in the Idaho courts, while some appeals possible under the Idaho Appellate Rules could not occur in the federal system. First, applying the collateral order doctrine of *Cohen*, the federal courts interpret 28 U.S.C. §1291 ordinarily to permit appeal of the pre-trial rejection of a qualified immunity defense, provided the appeal is limited to the question of "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Idaho, like many of the states, has not adopted a collateral order doctrine exception to its ban on interlocutory appeals, set out in Idaho Appellate Rule 11; accordingly the appeal of right available in

federal court under 28 U.S.C. §1291 does not exist in the Idaho courts.

Second, Idaho Appellate Rule 12(a) authorizes the Idaho Supreme Court to grant a permissive appeal

> from an interlocutory order . . . of a district court . . . which is not otherwise appealable under these rules but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the order resolution of the litigation.

Rule 12 is sufficiently broad to encompass the appeals permitted under *Mitchell*, since those federal appeals are limited to questions of law. Provisions such as these regarding appeals of controlling legal issues, then Judge Scalia once observed, are "particularly appropriate when claims of immunity are at issue." *McSurely v. McClellan*, 697 F. 2d 309, 317 n. 12 (D.C.Cir. 1982)(Per curiam opinion of Wald, J. and Scalia, J.). Rule 12(a) is more liberal than the analogous federal provision, 28 U.S.C. §1292(b), because a Rule 12(b) appeal can be authorized without the concurrence of the trial court.[9] Thus any defendant whose proffered qualified immunity defense turns on a question of law has a right to have his or her request for review considered by the Idaho Supreme Court.[10]

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[9]The difference is of considerable importance. In *Mitchell v. Forsyth* the district judge had refused to certify for appeal under §1292(b) his rejection of Mitchell's qualified immunity defense. Brief for Petitioner, *Mitchell v. Forsyth*, No. 84-335, pp. 23-24.

[10]Under Rule 12 an appeal is not possible if there are not "substantial grounds" in support of the appellant's position; a federal appellate court would proceed somewhat differently in dealing with an insubstantial appeal, assuming jurisdiction over the appeal but often then summarily dismissing or affirming it. *Behrens v. Pelletier*, 116 S.Ct. 834, 841

Third, in at least one circumstance Idaho law provides a right of interlocutory appeal regarding qualified immunity where federal law would not. If, following a jury verdict in favor of a defendant regarding a fact-based qualified immunity defense, the trial court were to grant the plaintiff a new trial, that order would not be appealable in the federal system, *Allied Chem. Corp. v. Daiflon*, 449 U.S. 33, 34 (1980); Idaho Appellate Rule 11(a)(5), on the other hand, authorizes an interlocutory appeal as of right from any "order granting . . . a new trial." Thus Idaho law in some instances accords to section 1983 defendants a protection unavailable in federal court, the risk of having to go through *two* trials.

In sum, it is not the case either that Idaho forbids all interlocutory appeals regarding a qualified immunity defense, or even--had petitioners chosen to proceed under Rule 12--that petitioners necessarily could not have taken an appeal in the instant case. Taken as a whole the Idaho process and standards for interlocutory appeals regarding qualified immunity, while arguably less favorable for some section 1983 defendants, are undoubtedly equally or more favorable for other section 1983 defendants; at another point in the instant litigation those differences could conceivably work to the benefit of the instant petitioners. The issue in this case is thus *not* whether Idaho could forbid all appeals, or all interlocutory appeals, regarding qualified immunity, but whether the particular contours of Idaho procedure regarding such appeals must mirror precisely the

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(1996). This difference in procedure, however, is fairly nominal, since the state court appellant is permitted to submit a brief arguing that its appeal raises a substantial issue (Idaho Appellate Handbook, section 9.4.5.4(1996)), while a federal appellant need not be allowed to present argument prior to the summary dismissal or affirmance of its appeal. This difference may at times inure to the benefit of the state-court defendant-appellant, since the unexplained rejection of a Rule 12 appeal would not have the law-of-the-case preclusive effect of the summary disposition of a federal appeal.

specific practice that would be followed in federal court.

II. FEDERAL LAW DOES NOT PREEMPT NEUTRAL STATE RULES OF APPELLATE PROCEDURE WHERE STATE COURTS EXERCISE JURISDICTION OVER SUITS AGAINST STATE OFFICIALS UNDER SECTION 1983

(1) The appeal presented here was dismissed by the Idaho Supreme Court pursuant to neutral rules of appellate jurisdiction under which Idaho has provided only for permissive appeals, but not appeals as of right, for such interlocutory decisions. It is well established that federal causes of action, including section 1983, do not override such state procedural rules. "The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372 (1990). "[A]bsent specific direction from Congress the state courts have always been permitted to apply their own reasonable procedures when enforcing federal rights." *Southland Corp v. Keating*, 465 U.S. 1, 31 (1984)(O'Connor, J., dissenting). "The States thus have great latitude to establish the structure and jurisdiction of their own courts" and "may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law" *Howlett v. Rose*, 496 U.S. at 372 (citations omitted). As the Idaho Attorney General observed in an earlier brief in this Court, "sovereign states . . . have an interest in allocating their judicial resources, and in controlling the conditions under which their courts can be used, to the fullest extent consistent with the Constitution."[11] .

This Court has repeatedly held that a state may apply such neutral state procedural rules even when they have the

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[11]Brief Amicus Curiae of the States of California, et al., *Felder v. Casey*, No. 87-526, p. 1.

effect of precluding a federal claimant from suing in state court at all, so long as the state rule is a neutral standard not inconsistent with federal law. *Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950)(state forum non conveniens law); *Herb v. Pitcairn*, 324 U.S. 117 (1945)(state venue law): *Douglas v New Haven R. Co.*, 279 U.S. 377 (1929)(facially neutral statute baring suits by non-residents against corporations not doing business in the state). A fortiori a state may apply a neutral procedural rule where, as here, that rule does not alter at all the ultimate outcome of a section 1983 proceeding, but merely affects the order in which the issues presented will be resolved.

There are countless differences between federal procedure and the procedural rules and statutes of each of the fifty states. Neither the requirement that state courts of competent jurisdiction must entertain certain federal causes of action, nor the voluntary exercise of state court jurisdiction over federal claims that may be filed in state court, ordinarily imposes on the state judiciary an obligation to follow the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, or the procedural provisions in Title 28 of the United States Code. The exercise of state jurisdiction over a federal cause of action emphatically does not mean "that for the purpose of enforcing the [federal] right the state court [is] to be treated as a Federal court deriving its authority not from the State creating it, but from the United States." *Howlett v. Rose*, 496 U.S. at 371 n. 17; *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916)

The specific circumstances of this case illustrate in a particularly pointed manner the complex problems that would arise if section 1983 interlocutory appeals in state court were governed by federal rather than state procedures. Federal law provides not only the starting point at which a federal appeal can be taken--after the denial of a qualified immunity defense based solely on an issue of law--but also the cut off point. Had the motion to dismiss at issue in the case in fact been filed in federal rather than court, petitioners would have had 30 days

from the denial of that motion to file a notice of appeal. Fed. Rules of App. Pro., Rule 4(a)(1). Under Idaho Procedure, on the other hand, appeals can be filed up to 42 days after the entry of an appealable order. Idaho Appellate Rule 14(a). In the instant case, the order denying the motion to dismiss was entered on February 23, 1996, and petitioners filed their notice of appeal on April 4, 1996, some 41 days later. Thus petitioners can prevail only if federal law controls when the time for taking an appeal commences, but state law determines the point at which that period ends.

Few procedural issues are of greater practical importance to the structure of a state's judicial system, or more related to local circumstance and practice, than the issue of when litigants can take appeals. A state's rules defining when a judgment is final for purpose of appeal and whether and how appeals from interlocutory rulings will be entertained go to the heart of the state's sovereign power to control the operation of its courts. "[The] right of review in the appellate court is purely a matter of state concern," *Kohl v. Lehlback*, 160 U.S. 293, 299 (1895); "whether an appeal should be allowed, and if so, under what circumstances, are matters for each state to determine for itself." *McKane v. Durston*, 153 U.S. 684, 688 (1894). Congress has never enacted a statute expressly dictating that state courts must alter their rules of appellate jurisdiction when federal claims are at issue, and this Court has never found that federal law tacitly overrides state rules governing the timing of appellate review.

The general prohibition against interlocutory appeals embodied in Idaho Appellate Rule 11, and applied by the Idaho Supreme Court in this case, is not some recent Idaho innovation, but a virtually universal procedural rule well known to the Congress which adopted section 1983. "[T]he final judgment rule is the dominant rule," *DiBella v. United States*, 369 U.S. 121, 126 (1962), reflecting a "deeply-held distaste for piecemeal litigation." *Richardson-Merrell, Inc., v. Koller*, 472

U.S. 424, 440 (1989).[12] The rule against interlocutory appeals dates from Roman times[13], and was well established both in England[14] and in early federal practice, when appeals were limited to "final judgments" and "final decrees."[15] Idaho, like virtually every state in the union[16], does not ordinarily permit appeals of the myriad intermediate rulings that may lead up to the final resolution of a civil or criminal case. As this Court recognized in *Johnson v. Jones*, 115 S.Ct. 2151 (1995):

> [R]ules that permit too many interlocutory appeals can cause harm. An interlocutory

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[12]*Cobbledick v. United States*, 309 U.S. 323, 325 (1940)("Finality as a condition of review is an historic characteristic of federal appellate review").

[13]Crick, "The Final Judgment as a Basis for Appeal", 41 Yale L.J. 539, 540-41 (1932).

[14]*McLish v. Roff*, 141 U.S. 661, 665 (1891)(in limiting appeals to final judgments the 1789 Judiciary Act only declared "a well settled and ancient rule of English practice.")

[15]1 Stat. at Large 83, 84, 85, §§21, 22, 25. In 1830, commenting favorably on this limitation in the Judiciary Act, Justice Story observed:

> "It is of great importance to the due administration of justice and is in the furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon *final* judgments only, that causes should not come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses."

Canter Admx. v. Amer. Inc. Co., 3 Pet (28 U.S.) 307, 318 (1830)(emphasis in original).

[16]The sole exception appears to be New York. *See* N.Y.Code Civil Practice Law and Rules §5701; Scheffel, "Interlocutory Appeals in New York--Time Has Come for a More Efficient Approach" 16 Pace L.Rev. 607 (1996).

> appeal can make it more difficult for trial judges to do their basic job--supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial court simply proceeded, would have turned out to be unnecessary.

115 S. Ct. at 2154. Idaho's restrictions on interlocutory appeals reflect similar concerns:

> [I]n a proper system of appeals . . . to permit an appeal from all intermediate orders and decisions of the district courts would result in such vexatious and intolerable confusion and delay as to render impossible an orderly and expeditious administration of justice by the courts of the state.

State ex rel. State Bd. of Medicine v. Smith, 80 Idaho 267, 269, 328 P. 2d 581, 582 (1958).

A state's interest in limiting interlocutory appeals is particularly great where, as here, the procedure in question concerns the mandatory jurisdiction of the state's highest court. Idaho, like other small states, has no intermediate appellate courts.[17] Any *right* to take an interlocutory appeal would impose a burden directly on the Idaho Supreme Court, necessarily interfering with its ability to meet its far more pressing responsibilities within the state judicial system. Requiring all five justices of the Idaho Supreme Court to hear a case would impose a greater practical burden than the federal

[17]The Idaho District Courts, in which the instant action was filed, do function as intermediate appellate courts hearing appeals from the state's Magistrate Courts.

procedure under *Mitchell*, which requires that appeals be heard by three of the twenty-eight Ninth Circuit judges.[18] At present Idaho Appellate Rule 12 gives the Idaho Supreme Court a degree of control over interlocutory appeals on its docket. Application of *Mitchell v. Forsyth* to state section 1983 actions could well burden the Idaho Supreme Court with a substantial number of such appeals, quite possibly with several such interlocutory appeals as of right in the same case. *Behrens v. Pelletier*, 116 S.Ct. 834 (1996). A federal statute granting federal section 1983 defendants an absolute right to appeal to *this* Court denials of qualified immunity, abolishing the discretion that now exists to deny certiorari in such cases, would wreak havoc on this Court's workload; no similar burden should lightly be imposed on the Idaho Supreme Court. The ability of a state to control the use of its judicial resources would be undermined if the federal courts were to permit state court litigants raising federal claims to disregard neutral state law rules regarding state appeals. *Coleman v. Thompson*, 501 U.S. 722 (1991) .

(2) In *Felder v. Casey*, 487 U.S. 131 (1988), this Court indicated that the principles of *Erie R. Co. v. Thompkins*, 304 U.S. 64 (1938), and its progeny were useful in identifying those essentially procedural state laws that could, consistent with the Supremacy Clause, be applied in state court to federal claims. 487 U.S. at 151; see *Brown v. Western Railway of Alabama*, 338 U.S. 284, 296 n. 1 (1949). The function of a state law regarding interlocutory appeals is to allocate among the state's judges the authority to decide a particular issue prior to the entry of final judgment. A state's rules regarding when interlocutory appeals are permitted or prohibited thus "rests on

[18]The potential burden on the Idaho Supreme Court is all the greater because under Idaho law, unlike the federal system, once one party is permitted to take an interlocutory appeal, the opposing party may then take a cross-appeal of any other interlocutory decision in the case. Idaho Appellate Rules 11(f), 12(d).

consideration of the efficient ordering of relationships between appellate and trial courts." 15A Wright, Miller and Cooper, Federal Practice and Procedure, §3905, p. 239 (1992). Where a right to an interlocutory appeal exists, the litigants can obtain a decision on that issue from at least one level of appellate judges; in the absence of such an interlocutory appeal, the trial court judge will ordinarily be the judge who will resolve this issue prior to a decision on the merits. Such an allocation of authority as between the trial judges and the appellate judges in a legal system is a quintessential procedural matter under *Erie*. *Gasperini v. Center for the Humanities, Inc.*, 116 S.Ct. 2211, 2222, 2224 (1996).

Petitioners suggest that the absence of an interlocutory appeal as of right is "outcome determinative." (Pet. Br. 23, 25, 27-28) The "outcome determinative" factor referred to in *Felder v. Casey* is the standard applied under *Erie*. *See Felder v. Casey*, 487 U.S. at 151, *quoting Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). Under *Erie* and *Guaranty Trust* "outcome determinative" has always been understood to refer to which party would prevail on the merits, or what remedy would ultimately be awarded. *See e.g.*, *Guaranty Trust Co. v. New York* (state statute of limitations barring litigation of claim at issue)[19]. The term "outcome" by definition refers to where the parties will stand at the *end* of the litigation process.[20]

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[19]*Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980)(statute of limitations bar); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949)(statute of limitations bar); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949)(action barred in state court because plaintiff corporation had not qualified to do business in the state.)

[20]E.g. Webster's College Dictionary, p. 959 (defining "outcome" as "a final product or end result")(1991).

In *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), this Court held that under *Erie* a federal court could order a physical examination of a plaintiff, even though such a compulsory examination would not have been allowed had the action been litigated in state court. The Court rejected an argument that ordering such an examination abridged or enlarged substantive rights, explaining that it was a rule which "really regulates procedure--the judicial process for enforcing rights and duties." 312 U.S. at 14.

The state laws at issue in *Felder*, *Howlett*, and *Burnett v. Grattan*, 468 U.S. 42 (1984), were outcome determinative because, had the state statutes there at issue been applied, the plaintiffs' state court section 1983 actions would have been dismissed. In the instant case, on the other hand, application of Rule 11 will not affect in any way whether respondent will ultimately recover the monetary relief sought in her complaint.

Petitioners argue that, in the absence of a right to take in state court an interlocutory appeal regarding qualified immunity, section 1983 defendants will remove those proceedings to federal court. Petitioners do not point, however, to any evidence of an actual tidal wave of section 1983 removals in the states that have barred such interlocutory appeals as of right since the late 1980's.[21] This argument, moreover, misapprehends the significance of the federal removal statute. In enacting 28 U.S.C. §1441, Congress did not intend to create a problem--risk of removal--which the courts would then solve by federalizing state procedure, but instead sought to provide a remedy for a defendant which concluded that a plaintiff's choice of a state forum had put it at an unfair disadvantage. Federal law does not seek to require that state courts adjudicating federal causes of action follow federal procedure whenever it diverges from state practice. Rather, federal law recognizes that "[s]ome differences in remedy

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[21]*Pizzato's, Inc. v. City of Berwyn*, 169 Ill. App. 3d 796, 798, 523 N.E. 2d 51, 53 (Ill. Ct. App. 1988), *appeal denied*, 122 Ill. 2d 593, 530 N.E. 2d 263 (1988), *cert. denied sub nom. City of Berwyn v. Pizzato's Inc.*, 489 U.S. 1054 (1989); *Ohio Civil Service Employees Association v. Moritz*, 39 Ohio App. 3d 132, 529 N.E. 2d 1290 (Ct. App. 1987).

and procedure are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered." Hart, "The Relations Between State and Federal Law", 54 Colum. L. Rev. 489, 508(1954). Removal is the manner in which Congress has chosen to address those differences between state and federal procedures.

"Litigants who choose to bring their civil rights actions in state courts presumably do so in order to obtain the benefit of certain procedural advantages in those courts . . . ." *Felder v. Casey*, 487 U.S. at 150.[22] If the Supremacy Clause required elimination of any aspect of state procedure favorable to a federal claimant, and thus any potential incentive for removal, all of the state "procedural advantages" which might attract federal claimants to state court would have to be invalidated. Any number of aspects of state procedure might well matter far more to a defendant than the lack of an interlocutory appeal regarding a qualified immunity motion a defendant might not expect to make, or was confident of winning at the trial court level. Under petitioners' approach, virtually every aspect of state procedure would be at risk, and the state procedures that would have to be supplanted by federal procedure would undoubtedly vary from case to case. At the same time, on the other hand, any alteration of state procedure designed to eliminate procedures favorable to plaintiffs could well have the effect of inducing plaintiffs not to file in state court in the

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[22]*Felder v Casey*, 487 U.S. at 163(O'Connor, J., dissenting)("A plaintiff who chooses to bring a §1983 action in state court necessarily rejects the federal courts that Congress has provided. Virtually the only conceivable reason for doing so is to benefit from procedural advantages available exclusively in state court"); *St. Louis, B. & M. Ry. v. Taylor*, 266 U.S. 200, 208 (1924)("the plaintiff . . . is entitled to whatever remedial advantage inheres in the particular forum.")

first place, particularly if those state procedures which happened to favor defendants were left unaltered. Only an exact replication of federal procedure in state court would eliminate incentives for one party or the other to prefer federal court. Such an effort would ultimately be doomed to failure because of differences between the federal and state judicial systems that could not be eliminated, such as the identities of the judges who sit in each.

Even with regard to appeals regarding qualified immunity, the task of replicating in state court the procedures followed in federal court could be a daunting one. As this Court's decisions in *Johnson* and *Behrens* well illustrate, the decision in *Mitchell* has spawned a series of emerging subsidiary legal issues regarding appealability.[23] Pending resolution of any of these issues by this Court, the state courts would be forced to decide what combinations of federal district court and appellate decisions on an issue were sufficient under the Supremacy Clause to require state courts to adhere to that line of decisions. In the instant case, for example, it is far from clear that the collateral order doctrine applied in *Mitchell v. Forsyth* would apply, since here--unlike the usual qualified immunity case--the plaintiff has asserted a claim for injunctive relief, relying on the same factual allegations underlying her damage claim. Thus regardless of how the qualified immunity issue is resolved, petitioners will still face discovery and the practical necessity of testifying at

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[23]See, e.g., 15A Wright, Miller and Cooper, Federal Practice and Procedure, §3911, pp. 359-60 (does failure to take an appeal permitted by the collateral order doctrine bar appeal of the same issue following final judgement?), 362-65 (does the taking of an appeal under the collateral order doctrine bar continued proceedings in the district court?), 392-95 (to what degree may issues not otherwise appealable be considered on appeal because related to the issue appealable under the collateral order doctrine?).

any trial. Here, unlike *Mitchell*, an interlocutory appeal will have little practical effect on any trial burdens facing the appellants, but will only address what type of remedy respondent can win if she should ultimately prevail in the merits[24]. It is difficult to see how the collateral order doctrine applies in such a situation.

(3) Petitioners' principal argument is that in cases brought under section 1983 Idaho must interpret the term "final" in Idaho Appellate Rule 11 to conform to the federal interpretation of the term "final" in section 1291. (Pet. Br. 15-20). The federal courts have construed the phrase "final decision" in 28 U.S.C. § 1291, to encompass certain interlocutory rulings rejecting qualified immunity claims. According to petitioner, because of these decisions, the Idaho Supreme Court is obligated to construe Idaho Appellate Rule 11(a), despite its different terminology, "to apply the federal definition of finality and accept the appeal because it meets the federal definition of a final order or decree." (Pet. Br. 19). Under petitioners' theory, Idaho's jurisdictional rules would have to be given two different meanings, depending on whether federal or state claims were involved.

This unusual claim is clearly wrong. Federal interpretations of federal statutes do not control the interpretation of state statutes or rules. To the contrary, this Court has recognized that on issues of state law the interpretation of a state's highest court is controlling--even in federal court and even where federal claims are affected. *Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456, 465 (1967). Moreover, states are not compelled to construe

[24]Petitioners' argument rests heavily on their asserted desire to avoid discovery and testifying at trial. (Pet. Br. 8, 9, 10, 12, 14, 15, 17, 25, 26). As a practical matter, however, even a successful appeal of the rejection of their qualified immunity defense would do little to alter those burdens.

state rules of appellate jurisdiction to conform to federal views on finality. The Idaho courts have determined that Rule 11(a)(1)'s provision for appeals from "[j]udgments, orders and decrees which are final," does not include interlocutory rulings on immunity defenses, but limits appeals to judgments that end the litigation. *See Idah-Best, Inc. v. First Security Bank of Idaho*, 99 Idaho 517, 584 P.2d 1242, 1244 (1978). This determination is conclusive and binding on both state and federal courts.

Even if the terminology of the federal statute and the state rule governing appeals of right were identical, the Idaho Supreme Court would be entitled to follow its own construction of the state rule. In fact, however, the language of the federal and state rule are different. Federal law provides for appeals from "final decisions." 28 U.S.C. § 1291. Idaho law provides for appeals of right from "[j]udgments, orders and decrees which are final." Idaho Appellate Rule 11(a). Petitioners assert that the state "must accept the federal definition of finality" (Pet. Br. 15), but although the adjective "final" appears in both Rule 11(a)(1) and section 1291, it modifies different nouns.[25]

III. APPLICATION IN THIS CASE OF IDAHO APPELLATE RULE 11 NEITHER CONFLICTS WITH NOR DISCRIMINATES AGAINST FEDERAL LAW

(1) Petitioners contend that the application in this case of Idaho Appellate Rule 11 is inconsistent with the Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). This

[25]Petitioners assertion that the Idaho Supreme Court must accept "the federal definition of a final order or decree" (Pet. Br. 19) ignores the fact that what this Court's decisions actually define is the phrase "final decision."

argument misapprehends the rationale and holding of that case.

The appealability within the federal judicial system of a qualified immunity defense is governed, not by the particular substantive provisions of section 1983, but by the general procedural statutes regulating civil appeals. *Mitchell* itself was avowedly an application of 28 U.S.C. §1291, which authorizes appeals to the circuit courts of "final decisions" of district courts. The central premise from which *Mitchell's* analysis proceeded was that

> [a]lthough 28 U.S.C. §1291 vests the courts of appeals with jurisdiction over appeals only from "final decisions" of the district courts, "a decision 'final' within the meaning of §1291 does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964)

472 U.S. at 524. The actual holding in *Mitchell* was expressly framed as an interpretation and application of section 1291:

> [W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. §1291, notwithstanding the absence of a final judgment.

472 U.S. at 530. The wording of section 1291 is of controlling importance; if, for example, section 1291 permitted appeals only of final "judgments" or "decrees", as was true under the original Judiciary Act, there would be no right in federal court to take an interlocutory appeal of any qualified immunity decision, regardless of section 1983.

In concluding in *Mitchell* that certain denials of qualified immunity constitute "final decisions" within the

meaning of section 1291, this Court applied the collateral order doctrine set out in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny. The collateral order doctrine, however, is not a facet of section 1983 jurisprudence; neither *Cohen* nor the numerous collateral order decisions of this Court prior to *Mitchell* had arisen under the federal civil rights laws.[26] For example, stressing that section 1291 controls the appealability of issues "in both civil and criminal cases," this Court relied on this line of section 1291 jurisprudence to hold that the denial of a double jeopardy defense is a "final decision" subject to immediate appeal, despite the fact that there was no constitutional right to such an appeal.

> The right of appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute--in this case, 28 U.S.C. §1291. . . . We . . . hold that pretrial orders rejecting claims of former jeopardy, such as that presently before us, constitute "final decisions" and thus satisfy the jurisdictional prerequisites of §1291.

Abney v. United States, 431 U.S. 651, 656-62 (1977).

Cohen announced a three part test for determining whether a decision fell within the scope of the collateral order doctrine; the application of that doctrine in any particular case therefore requires a court to determine the

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[26]*Cohen* was a stockholders' derivative action. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983)(action under United States Arbitration Act); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1973)(anti-trust and securities action); *Swift & Company Packers v. Compania Colmbiana Del Caribe*, 339 U.S. 684 (1950)(admiralty).

nature of the issue which a party seeks to appeal. Accordingly, this Court in *Mitchell* evaluated the factors identified as controlling by *Cohen*: the nature of the qualified immunity issue which Mitchell sought to appeal, 472 U.S. 525-27, the conclusiveness of the order appealed from, 472 U.S. at 527, and whether the issues raised by that appeal were separable from the merits of the underlying controversy. 472 U.S. at 527-28. But that analysis of the *Cohen* factors no more meant that the right of appeal in *Mitchell* was required by section 1983 itself than the similar analysis in *Abney* meant that the Double Jeopardy Clause by itself required the federal (or state) courts to entertain an interlocutory appeal whenever a double jeopardy defense was denied. To the contrary, *Abney* emphasized that "there is no constitutional right to appeal"--interlocutory or otherwise--an order denying a double jeopardy defense. 431 U.S. at 656. Indeed, *Abney* noted that appeals as of right did not exist at all for federal criminal defendants until 1889 or later. 431 U.S. at 656 n. 3.

Petitioners argue that, if they are unable to take an immediate interlocutory appeal, they will be forced to face discovery and trial even though an appellate court may later hold that that rejection of their qualified immunity defense was error. But in *Johnson v. Jones*, 115 S.Ct. 2151 (1995), this Court expressly rejected that argument that avoiding the risk of unwarranted trial court proceedings was sufficient by itself to require an interlocutory appeal. *Johnson* held that, despite the existence of that very risk, a defendant in federal court cannot appeal the denial of a qualified immunity defense insofar as it is based on a determination that there is a genuine issue of fact to be tried.

> We recognize that . . . a determination about "genuine" issues of fact for trial . . . still forces public officials to trial. See Brief for Petitioners 11-16. And to that extent, it threatens to undercut the very policy (protecting public officials from lawsuits) that (the *Mitchell* Court held) militates in favor of immediate appeals. Nonetheless, the countervailing considerations that we have mentioned (precedent, fidelity to statute, and underlying policies) are too strong to permit the extension of *Mitchell* to encompass appeals from orders of the sort before us.

115 S.Ct. at 2158. The statute to which fidelity was owed in *Johnson* was section 1291, not section 1983, and the "underlying policies" invoked were "the competing considerations that underlie questions of finality." 115 S. Ct. at 2157.

Even where a purely legal issue is presented, the right of appeal under section 1291 recognized in *Mitchell* does not include a right to insist that *this* Court hear such an interlocutory appeal. Thus while a federal circuit court must hear, prior to trial, a qualified immunity appeal raising such a legal issue, neither this Court nor an en banc circuit court are obligated to do so. Even federal procedure therefore does not guarantee that prior to discovery and trial there will be a definitive determination of the legal issues regarding qualified immunity.

(2) Idaho Appellate Rule 11, to be sure, is different than section 1291. Although the collateral order doctrine is a well established gloss on section 1291, Idaho has not construed Rule 11 to encompass such appeals. That difference, however, is entirely unremarkable. The very wording of Rule 11 is different than section 1291, referring to "[j]udgments, orders and decrees which are final," rather

than to "final decisions."[27] Idaho caselaw has historically emphasized the distinction between "decisions" and "judgments" when addressing issues of appealability.[28] Under Idaho law, a ruling is appealable as a final judgment, order or decree only if it ends the suit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. *Idah-Best, Inc. v. First Security Bank of Idaho*, 99 Idaho 517, 584 P. 2d 1242, 1244 (1978).

Idaho is hardly unique in choosing to interpret its laws not to encompass the collateral order doctrine in *Cohen*. A substantial number of states have expressly declined to construe their state statutes or rules to encompass a collateral order exception to the usual requirement of a final judgment.[29] Other states have chosen to apply some type of

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[27]Petitioners acknowledge that in *Cohen* "[t]his Court has construed 'final decision' to be more encompassing than 'final judgment.'"(Pet. Br. 13 n. 7).

[28] *See Farmers Equipment Co. v. Clinger*, 70 Idaho 501, 222 P. 2d 1077, 1078 (1950)(memorandum decision is not a judgment from which an appeal can be taken); *Blaine County Inv. Co. v. Mays*, 52 Idaho 381, 15 P. 2d 734, 735 (1932)("decision" by trial court is not the same as a "judgment").

[29]Alabama: *Ex Parte Franklin County Dept. of Human Resources*, 674 So. 2d 1277, 1279-80 (Ala. 1996)(collateral order doctrine unnecessary since defendants asserting qualified immunity have "an adequate remedy" under state law similar to 28 U.S.C. §1292(b)); Alaska: *Kerttula v. Abood*, 686 P. 2d 1197, 1201 (Alaska 1984)(rejecting collateral order doctrine because the "considerations underlying the federal exceptions are adequately met by" state law similar to 28 U.S.C. §1292(b));Arkansas: *Herron . v. Jones*, 637 S.W.2d 569, 571, 276 Ark. 493, 496 (1982)(rejecting collateral order doctrine because it "has been a prolific source of uncertainty"); Illinois: *Pizzato's Inc. v. City of Berwyn*, *supra*, 168 Ill. App. 3d at 798, 523 N.E. 2d at 53 ("[r]egardless of how well

collateral order doctrine, but in many instances the state version of that doctrine is clearly narrower[30] or broader[31]

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reasoned the 'collateral order' doctrine may be, it cannot be used to confer jurisdiction upon this court where none exists under Illinois law"); Missouri: *State v. Michaels*, 682 S.W. 2d 162, 163 (Mo. 1984)(collateral order doctrine not consistent with state statutes which only permit appeals from "final judgments"); Nevada: *State v. Greenspun*, 109 Nev. 1022, 1024, 862 P. 2d 423, 424 (1993)(rejecting collateral order doctrine because it would impose an undue burden on state supreme court): North Dakota: *State v. LaFontaine*, 293 N.W. 2d 426, 427 (N.D. 1980)(stressing that the North Dakota Supreme Court, unlike the Supreme Court of the United States, would itself have to hear any collateral order doctrine appeals); Ohio: *Celebreeze v. Netzley*, 554 N.E. 2d 1292, 1295, 51 Ohio St. 3d 89 (1990)("the federal collateral order doctrine . . . involves judicial construction of the federal final order statute and is thus not applicable to the states"); Rhode Island: *In re Joseph T.*, 575 A. 2d 985, 986 (R.I. 1990)(collateral order doctrine inconsistent with general state rule that appeals are limited to "a final judgment . . . that completely terminates the litigation"); Texas: *Permian Corp. v. W.R. Davis*, 610 S.W. 2d 236, 238 (Tex. Civ. App. 1980)(collateral order doctrine inconsistent with state rule that "only a final judgment is appealable"); Utah: *Merit Electrical & Instrumentation v. Utah Dept. of Commerce*, 902 P. 2d 151 (Utah App. 1995)(collateral order doctrine inconsistent with the intent of the state legislature): Virginia: *West v. Commonwealth*, 249 Va. 241, 243, 455 S.E. 2d 1, 2 (1995)(collateral order doctrine "inapposite because it involved the interpretation of a federal statute.").

[30]*E.g. Samuel v. Stevedoring Services of America*, 24 Cal. App. 4th 414, 418, 29 Cal. Rptr. 420, 422 (Ct. App. 1994)(state collateral order doctrine limited to orders that "direct the payment of money by appellant or the performance of an act by or against him"); *In re J.G.*, 627 A. 2d 362, 364 (Vt. 1993)(even when requirements of collateral order doctrine are met, decision whether to permit interlocutory appeal is a matter of discretion).

than the federal rule.

The mere fact that such state procedural provisions may differ from section 1291 does not raise a serious question under the Supremacy Clause. If that circumstance alone were sufficient to force Idaho to follow the standards of section 1291, all of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, and much of Title 28 of the United States Code, would have to be applied whenever any federal claim was litigated in state courts. If section 1291 applies where it benefits state court section 1983 defendants, that federal procedure would a fortiori be controlling where it favored the federal claimant. Idaho Appellate Rule 11 would presumptively be invalid under the Supremacy Clause, for example, insofar as it permits defendants to appeal from an order granting a new trial on qualified immunity, a right not accorded federal defendants, and insofar as it fails to permit civil rights plaintiffs to take an interlocutory appeal of a decision denying a preliminary injunction. See 28 U.S.C. §1292(a)(1). Similarly, if section 1291 jurisprudence governs a section 1983 claim in state court, those principles would surely apply as well to Idaho state criminal proceedings regarding federal constitutional claims. Thus under the interpretation of section 1291 in *Abney v. United States*, Idaho would have to permit an

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[31]*E.g. McGowan v. Our Savior's Lutheran Church*, 527 N.W. 2d 830, 832 (Minn. 1995)(state collateral order doctrine applies to any denial of a motion to dismiss alleging a lack of subject matter jurisdiction); *Goldston v. American Motors Corporation*, 392 S.E. 2d 735, 737, 326 N.C. 723, 727 (1990)(disqualification of counsel immediately appealable, notwithstanding *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985)); *Hanson v. Federal Signal Corporation*, 679 A. 2d 785 (Pa. Super. 1996)(denial of class certification appealable under state collateral order doctrine, notwithstanding *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)).

interlocutory appeal to the Idaho Supreme Court whenever a state trial court denied a motion to dismiss under the Double Jeopardy Clause, even though such an appeal of right might not be required by the Double Jeopardy Clause itself.[32]

Given the structure of the Idaho court system, moreover, it is unclear exactly how section 1291 could in any event be applied to Idaho state courts. Section 1291 governs appeals to the intermediate federal appellate courts, the circuit courts of appeals. Petitioners contend that they should be accorded a right to "appellate review . . . in the appropriate state appellate court." (Pet. Br. i). But Idaho has no intermediate appellate courts between the state District Courts and the Idaho Supreme Court. The court to which any appeal from such a District Court would have to be taken, the Idaho Supreme Court, occupies under Idaho law the position atop the system of state courts that this Court occupies atop the system of federal courts. State District Courts, on the other hand, themselves serve as intermediate appellate courts to review appeals from decisions by the state's Magistrate Courts. If federal law were somehow to govern appeals of section 1983 cases to the Idaho Supreme Court, the appropriate federal law would appear to be, not section 1291, but the statutes governing the grant of writs of certiorari by this Court. 28 U.S.C. §§ 1254, 1257.

(3) Because the right to take certain interlocutory appeals in federal court regarding qualified immunity derives from section 1291, rather than section 1983, it necessarily follows that the failure of a state to provide interlocutory appeal procedures identical to section 1291 cannot be said to

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[32]Surprisingly, the Attorney General of Idaho, as counsel for petitioners, and the Attorneys General of thirty-six states, as amici, both appear to advance precisely that argument. (Pet. Br. 10; Brief of the Commonwealth of Kentucky, et al., as Amici Curiae, p. 12).

be inconsistent with section 1983, any more than this Court's decision in *Johnson v. Jones* could be described as "violating" section 1983. Nothing in the language of section 1983 purports to modify the jurisdiction of any state's appellate courts. The legislative history of section 1983 reveals no intent to modify then well known and established state procedures for resolving civil litigation:

> The defects Congress perceived in state courts lay in their jury factfinding processes, which of course were skewed by local prejudice, . . . and not in their otherwise neutral rules of procedure. . . . Congress saw no need to alter these neutral procedural rules.

Felder v. Casey, 487 U.S. at 148 n. 4.

Of course, if a state were to refuse to recognize in a section 1983 action the qualified immunity defense established by *Pierson v. Ray*, 386 U.S. 547 (1967), and its progeny, a different question would be presented. (See Part V, *infra*). Idaho, however, does recognize that defense[33], and the Idaho District Courts will entertain prior to trial a motion to dismiss, or for summary judgment, on qualified immunity grounds. In the instant case, the Idaho District Court for Bonner County fully and fairly considered petitioners' proffered arguments. Counsel for petitioners submitted substantial briefing on the legal and factual issues asserted by their proffered defense, and were permitted to present an extensive oral argument. Petitioners do not question the fairness of either the state District Court process or the state judge who rejected their motion.

Petitioners object, not that they were denied a forum in which to fairly present prior to trial their qualified immunity defense, but that they were not given *two* such

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[33]*Arzen v. State*, 123 Idaho 899, 854 P. 2d 242 (1993).

forums. But Idaho need not create a right to appeal in civil cases at all. *See M.L.B. v. S.L.J.*, ---U.S.---(1996), 1996 WL 716328, *6 (U.S.). If Idaho may choose not to give its appellate courts jurisdiction over appeals in civil cases, a fortiori the state can control the timing of those appeals that it does allow. "[I]nterlocutory orders are not appealable 'on the mere ground that they may be erroneous.'"[34] *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 (1981). Because trial court judges can generally be assumed to accurately interpret the law[35], limitations on appeals from their decisions do not render unenforceable the underlying

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[34]Petitioners argue that the denial of an interlocutory appeal will "provide a windfall for §1983 plaintiffs who are the beneficiaries of erroneous rulings denying qualified immunity motions." (Pet. Br. 28). Such errors, however, do not accord any benefit to section 1983 plaintiffs; to the contrary, plaintiffs will ordinarily be worse off for such errors, since the time and expense they subsequently devote to trial will be for naught if that defense is ultimately sustained on appeal following final judgment. The denial of an interlocutory appeal regarding qualified immunity only benefits section 1983 plaintiffs where that interlocutory appeal would have failed on the merits, but only after imposing on those plaintiffs the burden of additional delay and expense. Petitioners, however, do not assert that plaintiffs receive any improper windfall by being spared the burden of responding to *unsuccessful* interlocutory appeals.

[35]Surprisingly, Attorneys General from thirty-six states urge this Court to hold that state judges are unlikely to be able competently to determine when a particular federal constitutional right was clearly established. Brief of the Commonwealth of Kentucky, et al., as Amici Curiae, p. 15. Nothing in the Supremacy Clause, however, requires or authorizes this Court to assume such inadequacy on the part of the state judiciary. "[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial . . . courts of the several States." *Stone v. Powell*, 428 U.S. 465, 494 n. 35 (1976).

rights or defenses involved. *Cf. Caterpillar, Inc. v. Lewis*, 65 USLW 4021, 4026 (1996).

The purpose behind Idaho Appellate Rule 11 does not conflict with section 1983. This is not a case, like *Felder v. Casey*, 487 U.S. 131 (1988), where the policy of Rule 11 is "manifestly inconsistent with the central objectives of the Reconstruction-Era civil rights statutes." 487 U.S. at 150, *quoting Burnett v. Grattan*, 468 U.S. 42, 54 (1984). To the contrary, the Idaho policy disfavoring interlocutory appeals has nothing to do with civil rights or claims against government officials; it is essentially the same neutral policy underlying section 1291--albeit with somewhat different contours--of avoiding the delays and burdens that so often follow from permitting interlocutory appeals.

Section 1983 contains on its face no express reference either to the qualified immunity accorded executive officials, or to the absolute immunities provided in certain circumstances to prosecutors, judges, and legislators. These immunities have been held to exist under section 1983 on the assumption that the Congress which first enacted that law meant to leave in place the common law immunities that existed in the nineteenth century. *Procunier v. Navarette*, 434 U.S. 555, 561 (1978); *Pierson v. Ray*, 386 U.S. 547, 561 (1967). But the general principle "that review of *nisi prius* proceedings [must] await their termination by final judgment" was also well established in the nineteenth century, having "derived from the common law and [been] enacted by the First Congress." *DiBella v. United States*, 369 U.S. 121, 124 (1962). This Court's interpretation of section 1291 in *Mitchell* did not suggest that the rule there announced had existed at common law, or was followed by any jurisdiction in 1871 when section 1983 was adopted. Indeed, in *Mitchell* the oldest decision the Solicitor General could identify which had permitted an interlocutory appeal

regarding qualified immunity had been handed down in 1982.[36] However well reasoned the collateral order doctrine in *Cohen* itself may be, it represented a significant modification of prevailing nineteenth century procedure.[37]

(4) Petitioners suggest that Rule 11 somehow "discriminates" against section 1983 actions. A state procedure can only fairly be described as discriminating against a federal cause of action where the state rule singles out federal claims, or a particular federal claim, for special disadvantageous treatment not imposed on claimants generally. In *Howlett v. Rose*, 496 U.S. 356 (1990), the Florida courts had held that state courts with general jurisdiction over all other tort claims could not hear section 1983 claims against local government bodies. This Court ruled that the state could not apply such a section 1983-specific bar to claimants who otherwise met "all the state-law procedures for invoking the jurisdiction of the court." 496 U.S. at 379. In *Felder v. Casey* Wisconsin required plaintiffs wishing to sue government officials--but not other potential defendants--to first file a special notice-of-claim; because no such prerequisite applied to tort actions against ordinary private defendants, the Court held that the statute "most emphatically does discriminate in a manner detrimental

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[36]Brief for Petitioner, *Mitchell v. Forsyth*, No. 84-335, pp. 17, 22 (*citing McSurely v. McClellan*, 697 F. 2d 309 (D.C.Cir. 1982)).

[37]15A Wright, Miller and Cooper, Federal Practice and Procedure, §3911, p. 332 and n. 6 (1992); 9 Moore's Federal Practice par. 110.10, p. 62 (1996)(*Cohen* "was a significant inroad on the historic federal policy against interlocutory appeals.")

to the federal right." 487 U.S. at 146.[38]

The principle underlying these cases is manifestly inapplicable to the instant case. Rule 11 does not single out for special treatment section 1983 actions, claims against government officials, or claims arising under federal law. To the contrary, the Idaho role against interlocutory appeals is a facially neutral general prohibition applied without regard to the subject matter of the claim, the law under which it arose, or the status of the defendants. To the extent that Rule 11 does create exceptions allowing certain types of interlocutory appeals, those exceptions are generally applicable to section 1983 actions, and can be invoked by plaintiffs and defendants alike. Thus the parties in a section 1983 action in state court--like all other civil litigants--may, for example, appeal from an order granting a new trial, a type of interlocutory appeal not available in federal court. Idaho Appellate Rule 11(a)(5). It is not correct to suggest, as petitioners do, that Idaho law permits interlocutory appeals from numerous other "collateral orders" (Pet. Br. 21); the decisions to which petitioners refer--from orders granting a new trial, suppressing evidence or reducing criminal charges--are not collateral orders under *Cohen* and cannot ordinarily be the subject of an interlocutory appeal in the federal courts.

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[38]In *McKnett v. St. Louis & S.F.R.Co.*, 292 U.S. 230 (1934), Alabama permitted suits in its courts arising from out-of-state events if the action arose under the laws of "another state", but not if the plaintiff alleged a federal cause of action. In invalidating that restriction, this Court explained that "the Federal Constitution prohibits courts of general jurisdiction from refusing to [enforce a federal claim] solely *because* the suit is brought under a federal law." 292 U.S. at 234 (Emphasis added).

IV. PREEMPTION IS UNWARRANTED BECAUSE THE INTERESTS PROTECTED BY THE QUALIFIED IMMUNITY DEFENSE ARE THE INTERESTS OF THE STATE ITSELF

Where state law does not permit interlocutory appeals by state officials regarding qualified immunity, there is no overriding *federal* interest that would justify compelling the states to entertain such appeals. State laws may be preempted if they would impose "major damage" to "clear and substantial interests" of the federal government. *United States v. Yazell*, 382 U.S. 341, 352 (1966). But the purpose of allowing interlocutory appeals from the denial of a state officials' qualified immunity claim in federal court is to protect *state*, not federal, interests. If a state has concluded that these state interests are not sufficient to justify affording state officials an interlocutory appeal, there is no reason to construe federal law to preempt state law.

Petitioners and their amici argue at length that the qualified immunity defense to a section 1983 action protects vital state interests. (Pet. Br. 11, 26). But the state of Idaho which adopted Rule 11 is the self-same state in whose interest petitioners ask the Court to invalidate that very Rule. The protections which qualified immunity accords to Idaho's state interests are not protections which Idaho is obligated to invoke. Clearly the Supremacy Clause would not be violated in a section 1983 action if the Attorney General of Idaho, as counsel for the defendants, declined--in federal or state court--to appeal an adverse decision regarding qualified immunity, or simply refused to assert that defense at all. Section 1983 was not enacted for the purpose of protecting state and local officials from civil rights lawsuits. Rather, the qualified immunity defense constitutes merely a limitation chosen by Congress on the lengths it was disposed to go to protect

federal constitutional rights. Such a limitation serves no federal interests, and thus cannot provide a basis for federal preemption.

Petitioners' argument ignores, as well, the vital interests that Idaho has in avoiding the inefficiencies that may be caused by interlocutory appeals. As this Court noted in *Johnson v. Jones*, interlocutory appeals can easily burden appellate courts with unnecessary appeals that would never have occurred had the litigation proceeded to final judgment. 115 S.Ct. at 2151.[39] In addition, "permitting piecemeal appeals would undermine the independence of the [trial] judge, as well as the special role that individual plays in our judicial system." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 374 (1981). Limiting interlocutory appeals is generally "crucial to the efficient administration of justice," *Flanagan v. United States*, 465 U.S. 259, 264 (1984), because such appeals are likely to involve "disruption, delay and expense." *Richardson-Merrell Inc., v. Koller*, 472 U.S. 424, 430 (1985).

In the absence of a successful interlocutory appeal, to be sure, the state or local officials named as defendants in a section 1983 action may have to devote some time and effort to discovery and trial. Permitting such an appeal, however, will consume a significant amount of time and effort by the five Justices of the Idaho Supreme Court. The defendants in a section 1983 action will almost always be officials whose time and responsibilities in state government are considerably less vital than those of the state Supreme Court. In the instant case, the focus of the litigation will be likely be the

[39]9 Moore's Federal Practice §3905, p. 238 (1996)("The courts of appeals are heavily burdened and must be able to avoid impositions on their jurisdictions, not only as a matter of self-interest but also to make the best use of the increasingly scarce resource of appellate capacity.")

testimony of the manager of a small state operated liquor store. Idaho could reasonably conclude that it is more important to spare the state Supreme Court from having to hear interlocutory appeals in cases such as this than to avoid inconveniencing the minor officials typically involved. That judgement is particularly reasonable because *all* such interlocutory appeals will require a diversion of time and effort in the Idaho Supreme Court[40], while only *some* interlocutory appeals--those in which the qualified immunity defense is sustained on appeal--will ultimately save any time or effort on the part of the defendant officials. Idaho also might laudably conclude that the state itself had an interest in vindicating--without the delays attendant to interlocutory appeals--the claims of Idaho citizens whose federal constitutional rights had been violated.

Reasonable people, to be sure, could differ regarding where a state's interests lie in this type of situation. But Idaho law entrusts the determination of the state's interests to the Idaho Supreme Court, which is authorized to promulgate the Idaho Appellate Rules, subject to such modification as the Idaho legislature chooses to enact. The Idaho Attorney General, as counsel for petitioners, evidently believes that the Idaho Supreme Court, by promulgating Rule 11, and the Idaho legislature, by failing to modify that Rule, have misapprehended the state's true interests. This case thus presents the somewhat unusual spectacle of a state Attorney General attacking the validity of his own state's Appellate Rules.

The Attorney General is free to advance to the Idaho

[40]Application of the federal collateral order doctrine would also require the Idaho Supreme court, in a case such as this, to devote resources to determining whether the denial of petitioners' motion was based on legal or evidentiary grounds. *See City of Lakewood v. Brace*, 919 P. 2d 231 (Colo. 1996).

Supreme Court or the state legislature his views on this issue, and either state institution is at liberty to amend Idaho Appellate Rule 11 to authorize precisely the sort of appeals sought in this case should they conclude that Idaho's interests would indeed best be served by such a procedure.[41] But if, despite the entreaties of the state Attorney General, neither the Idaho Supreme Court, the Idaho legislature, nor the voters of the state can be persuaded that Rule 11 should be amended to permit interlocutory appeals of denials of qualified immunity defenses, there is no reason why this Court should intervene in such an intra-state dispute. The competing interests at stake are the state's interest in limiting appeals to final judgments and the state's interest in protecting discretionary action by state officials through the qualified immunity doctrine. Where the state has concluded that these competing state interests do not justify an interlocutory appeal, there is no basis for federal preemption of state law.

The amicus brief filed in support of petitioners highlights the intra-state nature of this issue. In five states[42], statutes or court rules have been construed to preclude interlocutory appeals as of right regarding qualified immunity; the attorneys general of these states, rather than simply ask their own courts or state legislatures to modify the rules or statutes in question, have joined a brief in this Court asking that those state provisions be declared invalid under the Supremacy Clause. Attorneys General from a number of states which *do* permit interlocutory appeals as of right regarding qualified immunity ask this Court to hold that the

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[41]In 1989 the Texas legislature enacted just such a law in response to *Noyola v. Flores*, 740 S.W. 2d 493 (Tex. Ct. App. 1987). Texas Civil Practice and Remedies Code Ann. §51.014(5)(Vernon's 1996).

[42]California, Illinois, South Dakota, Ohio, and Washington.

procedure that already prevails in their states is constitutionally required. It is unclear why these amici would seek such a ruling other than to forestall the possibility that in the future the courts or legislatures in their states, despite the presumed arguments of the state attorneys general to the contrary, might conclude that their state's interests would be better served by avoiding such appeals.

V. A STATE MAY PROVIDE IN SECTION 1983 ACTIONS REMEDIES MORE FAVORABLE TO FEDERAL CLAIMANTS THAN WOULD EXIST IN FEDERAL COURT

Although a state may not discriminate against a federal cause of action, a state is generally free to provide special procedures for section 1983 cases where those procedures are more favorable to the underlying federal cause of action than would be the case in federal court, or even under the state's general procedural rules.

> States may make the litigation of federal rights as congenial as they see fit--not as a *quid pro quo* for compliance with other, uncongenial rules, but because such congeniality does not stand as an obstacle to the accomplishment of Congress' goals.

Felder v. Casey, 487 U.S. at 131.

Under the Supremacy Clause the controlling question is whether a state procedure or rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637,

651 (1971).[43] "[T]he central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett v. Grattan*, 468 U.S. 42, 55 (1984).[44] Section 1983 provides "a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). A state statute or rule which provides to individuals "whose federal constitutional . . . rights are abridged" *greater* remedies than would be available in federal court, or to ordinary litigants in state court, obviously is not "an obstacle" to the enforcement of those federal rights.

That a state may provide for the enforcement of a federal cause of action procedures and remedies more favorable to the claimant than would be available in federal court is illustrated with particularity by this Court's decision in *St. Louis, B. & M. Ry. v. Taylor*, 266 U.S. 200 (1924). The plaintiff in that action had sued the defendant railroad in state court, invoking a federal statute which imposed strict liability on shippers for any damage caused by subsequent common carriers.[45] The action in question could not have

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[43]*Felder v. Casey*, 487 U.S. at 140 (issue is whether the state law will "significantly inhibit the ability *to bring* federal actions")(emphasis added); *Brown v. Western R. of Alabama*, 338 U.S. 294, 299 (1949)("[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon *rights of recovery* authorized by federal laws.")(emphasis added).

[44]*Felder v. Casey*, 487 U.S. at 141 ("the central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors")

[45]34 Stat. 584, c. 3591, §7, par. 11, 12.

been brought in federal court, because federal practice did not permit personal service on the railroad[46] and did not authorize the use of quasi in rem proceedings. Missouri law, however, did authorize quasi in rem proceedings, and the plaintiff filed just such an action in state court. The railroad moved to dismiss that state court action, arguing that the state courts could not provide a remedy in circumstances in which federal court would have been closed to the federal claim, and that the "defense" provided by federal procedure was "substantive."[47] This Court unanimously rejected that argument.

> Congress created the right of action. . . . The federal right is enforceable in state court whenever its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws. Under [Missouri] law, this jurisdiction may be exercised, to the extent of applying property attached to the satisfaction of a claim, even though personal service cannot be made upon the defendant. That remedy is one which was not available to the [plaintiff] in the federal court for Missouri. But this fact is not of legal significance . . . . The origin of the right does not affect the manner of administering the remedy.

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[46]Federal law only authorized service on a defendant which was an inhabitant of or could be found in the state in which the federal court was located. *Ex parte Railway Co.*, 103 U.S. 794 (1880). The defendant in *St. Louis Ry.* resided in Texas, and the action had been brought in the District Court for Missouri.

[47]Brief for Petitioner, No. 89, October Term 1924, pp. 6, 14, 17, 20, 22.

266 U.S. at 208.

The outcome urged by petitioners in the instant case is particularly inappropriate because Idaho is unquestionably free, if it wishes, to create its own civil rights action for violations of federal constitutional rights, and to provide that in that state action there will be no qualified immunity defense at all. The Congress which first enacted section 1983 did not intend to preclude the states themselves from providing remedies for violations of the Fourteenth Amendment--if indeed Congress could do such a thing under section 5 of the Fourteenth Amendment--but only to provide an alternative federal remedy because state methods of implementing that Amendment had proved inadequate. As this Court stressed in *Monroe v. Pape*, 365 U.S. 167, 183 (1961), "The federal remedy is supplementary to the state remedy . . . ." *See Patsy v. Board of Regents of State of Fla.*, 457 U.S. 504, 506-07 (1982). Representative Bingham, speaking on behalf of the measure that became section 1983, observed that "the States have concurrent power to enforce the Constitution of the United States." Cong. Globe, 42nd Cong., 1st Sess., App. 85 (1871).

Consistent with the purpose of section 1983, and with their responsibilities under the federal constitution, a number of states have enacted laws creating a state cause of action for violations of the federal constitution. The particular contours of section 1983 do not preclude states from providing in their own causes of action remedies more generous than may exist under federal law. In several states, for example, a defendant government official who acts with a "malicious purpose" has no qualified immunity, e.g. Fla. Stat. §768(9)(a)(1989), although the existence of such a purpose would not preclude a finding of qualified immunity in a section 1983 action. *Harlow v. Fitzgerald*, 457 U.S. 800, 813-20 (1982). Although under section 1983 local governments are subject to awards of compensatory damages

only on a showing that the injury complained of was the result of an official policy or custom, *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a number of states have authorized imposition of municipal liability for federal constitutional violations based solely on *respondeat superior*. *E.g. Moor v. County of Alameda*, 411 U.S. 693, 698 (1973).[48] Similarly, Idaho, in enacting its own cause of action for violations of the Fourteenth Amendment, clearly could fashion a form of qualified immunity significantly narrower than the immunity available in a section 1983 action, or provide no qualified immunity at all. That being so, it is difficult to understand why Idaho cannot take the considerably more modest step of merely deferring until final judgment any appeals regarding the particular form of qualified immunity recognized by federal law.

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[48]This Court expressly upheld the authority of the states to do so. 411 U.S. at 710 n. 27 ("Petitioners argue that merely because 'Congress [did] not intend, as a matter of federal law, to impose vicarious liability upon a public entity for violations of the Civil Rights Acts committed by the entity's employees,' it does not follow 'that Congress also intended to preclude a state from imposing such vicarious liability as a matter of state law.' Reply Brief for Petitioners 4-5. Certainly this is true.")

CONCLUSION

For the above reasons the order of the Idaho Supreme Court should be affirmed.

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In The

Supreme Court of the United States

October Term, 1996

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Idaho

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Before proceeding to their legal argument, Petitioners would like to address two factual points. First, Respondent asserts at pp. 8, 16 and 31 of her brief that Idaho has no appellate court other than the Idaho Supreme Court and that all appeals from district court are heard directly by the Idaho Supreme Court. This is incorrect. The Idaho Court of Appeals began operations in 1982 and is assigned approximately fifty percent of the appellate cases in this state. Idaho Courts Annual Report 1995, Appendix, p. 1. On appeal from the district court, the Idaho Supreme Court may assign any appeal other than death penalty appeals to the Idaho Court of Appeals. Idaho Code § 1-2406(1) (1990). The Court of Appeals can and does hear cases involving 42 U.S.C. § 1983. *E.g., Dufur v. Nampa & Meridian Irr. Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996). The Idaho Supreme Court is not required to review cases that have already had appellate review in the Idaho Court of Appeals. Idaho Code § 1-2409 (1990).

Second, Respondent states that she is seeking injunctive relief against Dyke Nally, the current supervisor of the Idaho State Liquor Dispensary, who, Respondent asserts, "was added in the second amended complaint, in place of the State Liquor Dispensary, which was one of the original named defendants" and that Petitioners had "not sought to appeal with regard to Respondent's claim for injunctive relief." Respondent's Br., p. 4, n.2, and p. 7. Respondent was not seeking injunctive relief against Nally at times germane to this petition for certiorari. Respondent, in her first amended complaint, sought injunctive relief only against the Idaho Liquor Dispensary. J.A. 11. The Liquor Dispensary was dismissed as a party by the district court before Petitioners filed their notice of appeal to the Idaho Supreme Court. J.A. 62. Because the Dispensary was dismissed by the trial court, when Respondent asserts that Petitioners had "not sought to appeal with regard to respondent's claim for injunctive relief," Petitioners did not then appeal because there was no

claim for injunctive relief pending before the Idaho District Court from which an appeal could be taken.

Following remand of this case from the Idaho Supreme Court to the district court, Respondent moved to amend her first amended complaint and add Dyke Nally as a party. Petitioners then filed their petition for certiorari. Petitioners later moved to stay proceedings before the Idaho district court pending this Court's disposition of their petition for certiorari, and on the same day Petitioners stated they had no objection to the amendment. The trial court stayed all proceedings, and nothing more has been filed at the trial level.[1]

ARGUMENT

I. WHEN A FEDERAL CASE IS BROUGHT IN STATE COURT, THE STATE COURT MUST PROCEED IN A MANNER THAT PROTECTS THE RIGHTS OF THE LITIGANTS UNDER FEDERAL LAW

The primary premise underlying Respondent's Brief is that when a federal case is litigated in state court, the litigants

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[1] Petitioners would also like to clarify one issue regarding Idaho employment law to avoid misimpressions. Footnote 3 on p. 4 of Respondent's Brief states: "Idaho classified probationary employees may only be terminated for failure to satisfactorily complete their entrance probationary period." Importantly, however, probationary employees do not have a right to appeal a determination that they failed to satisfactorily complete the probationary period. In *Brigham v. Department of Health and Welfare*, 106 Idaho 347, 679 P.2d 147 (1984), the Idaho Supreme Court held:

> Unless specifically exempted from any of the rights accorded to all classified employees, probationary employees are entitled to the full range of procedural rights set forth in the Act. *The only right so denied probationary employees is the right to appeal a dismissal based on unsatisfactory performance.*

106 Idaho at 350, 679 P.2d at 150 (emphasis added). Thus, it is doubtful that probationary employees' dismissals implicate any established liberty or property rights.

must take the state courts as they find them, and state procedural rules and policies cannot be displaced, regardless of their impact upon federal rights. *E.g.*, Respondent's Br., pp. 12-13. However, such an absolute principle has never been adopted by this Court. Rather, when presented with a case in which a federal claim is litigated in state court, and a federal right is undermined by state law or procedure, this Court has looked to the nature of the federal right at stake and the impact of the state procedure or policy upon that right. While this Court has often been sharply divided in particular cases, in those instances where the federal right is substantial and the state procedure undermines that right, this Court has preempted the state procedure and, if necessary, required that a federal procedure be followed instead.

For example, in *Dice v. Akron, C&Y.R. Co.*, 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952), the Court held that the federal right to a trial by jury was a "fundamental feature of our system of federal jurisprudence," and that Ohio, when hearing a case brought under the Federal Employers Liability Act (FELA), could not send a factual issue concerning fraud to a judge, rather than a jury, for determination. *Id.*, at 363, 72 S. Ct., at 315. The Court reached this conclusion even though the Seventh Amendment right to a jury does not apply to the states, and Ohio, in its state negligence cases, routinely sent issues of fraud to the judge. *Id.*, at 362-63, 72 S. Ct., at 315.

Likewise, in *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1949), this Court refused to allow Georgia courts hearing FELA actions to apply Georgia's general practice of construing complaints strictly against the pleader. The *Brown* Court was squarely presented with the argument that state courts are "free to follow their own rules of practice and procedure." *Id.*, at 295, 70 S. Ct., at 106. In responding to this proposition, the Court was candid in its assessment that "to what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question." *Id.* The Court, nevertheless, concluded that a "federal right cannot be defeated by the forms of local practice" and that to hold otherwise would

mean that the "desirable uniformity in adjudication of federally created rights could not be achieved." *Id.*, at 296, 299, 70 S. Ct., at 106, 108.

In *Garrett v. Moore-McCormack*, 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942), the Court prefaced its discussion with the statement, "This Court has specifically held that the Jones Act is to have a uniform application throughout the country unaffected by 'local views of common law rules.' " *Id.*, at 244, 63 S. Ct., at 250. In the state court action brought under the Jones Act, this Court rejected a Pennsylvania policy placing on plaintiffs the burden of proof to overcome a release that was inconsistent with federal admiralty policy of requiring a defendant to sustain the release, stating:

> The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction to which the right itself originates. . . . [I]n trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

Id., at 245, 62 S. Ct., at 251 (footnotes omitted). *See also El Paso & N.R.Co. v. Gutierrez*, 215 U.S. 87, 92, 30 S. Ct. 21, 23, 54 L. Ed. 106 (1909) (rejecting a territorial statute's notice-of-claim requirement before bringing a FELA action); *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 512, 35 S. Ct. 865, 868, 59 L. Ed. 1433 (1915) (holding a state rule that plaintiff must prove that he was not contributorily negligent could not apply in a FELA action brought in state court because Congress preferred the federal rule that defendant must prove plaintiff's contributory negligence); and *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143 (1923) (holding a state could not apply a local practice that resulted in a waiver of a federal venue defense).

Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), is an example of this principle being applied in the § 1983 context. In *Felder*, this Court rejected the argument that federalism requires "federal law to take the state courts as it finds them," stating that federal law takes state courts as it finds them only insofar as those courts do not impose unnecessary burdens on federal rights and, further, that the "very notions of federalism upon which respondents rely dictate that the state's outcome determinative law must give way when a party asserts a federal right in state court." 487 U.S., at 150-151, 108 S. Ct., at 2313. This Court, in holding Wisconsin could not apply its notice-of-claim requirement to a § 1983 claim, emphasized the need for uniformity in § 1983 litigation, the importance of protecting the substantial federal rights of the litigants appearing in state court and the importance of fulfilling federal policies and objectives.[2]

To counter *Felder*, Respondent asserts that the federal right protected in that case was the § 1983 claim itself, but here Petitioners seek to assert a federal procedure stemming from 28 U.S.C. § 1291, the right to an immediate appeal from

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[2] Respondent makes much of the fact that the State of Idaho joined in an amicus effort in *Felder* arguing in favor of the State of Wisconsin and its notice-of-claim statute. However, that was the losing side of the case, and the holding of *Felder*, consistent with the earlier line of cases discussed above, was that a state, in hearing § 1983 cases, was obligated to proceed in a manner that protected the substantial rights of the parties under federal law. Petitioners are not seeking to unravel the *Felder* holding. As § 1983 defendants, they ask only that they receive equal treatment under this principle and that their federal defense, like the federal claim itself, not be extinguished by state law. Moreover, if Respondent truly believed in the litigants taking state courts as they find them, then her action should be dismissed for failing to comply with the Idaho Tort Claims Act's 180-day notice-of-claim requirement. See Idaho Code §§ 6-905 and 908. However, *Felder* precludes this result.

a final decision, and that this is distinct from a federal substantive right. This characterization of Petitioners' arguments ignores the underlying premise of *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985): Denial of a qualified immunity motion is final and substantive because proceeding to discovery and trial when a defendant is entitled to qualified immunity irreparably destroys the primary substantive benefits of the defense, among them avoidance of litigation. It is the immediate appeal that is essential to preserve the underlying substantive right. Whether the asserted right of appeal is characterized as procedural or substantive is artificial in this context; without the immediate appeal, as this Court held in *Mitchell*, the substantive right – "an entitlement not to stand trial or bear the burdens of litigation" – is lost. 472 U.S., at 526, 105 S. Ct., at 2815.

As importantly, as *Dice*, *Brown*, *Garret* and *Central Vermont* each illustrate, when necessary to protect an important underlying federal right or policy, this Court has not only displaced the state procedure, it has required that the federal procedure (in those cases, a jury determination of fact, the manner in which pleadings are construed, a federal presumption concerning releases and the federal allocation of the burden of proof on contributory negligence) be followed in its place. The federal right at stake here is critically important as a personal defense to § 1983 defendants, as is the underlying federal policy it protects – allowing speedy resolution of insubstantial claims and avoiding the disruptive impact that discovery and trial can impose on public officers. These interests warrant protection regardless of the forum in which a § 1983 claim is brought.[3]

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[3] Respondent also argues that "the legislative history of section 1983 reveals no intent to modify then well known and established state procedures for resolving litigation." Respondent's Br., p. 32. However, as this Court pointed out in *Felder*, 487 U.S., at 147, n.14, 108 S. Ct., at 2311, n.14, simply because Congress did not anticipate certain procedural developments when § 1983 was enacted does not suggest that all future state procedures would be consistent with the purposes and intent of the federal civil rights law. Qualified immunity is a defense Congress intended to remain intact in § 1983 litigation, *Howlett v. Rose*, 496 U.S. 356, 383, 110 S. Ct. 2430, 2446, 110 L. Ed. 2d 332 (1990), and denial of a qualified immunity motion is a final order from which an immediate appeal is necessary to protect the substantive benefits of the entitlement. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Given these decisions, the Idaho Supreme Court's dismissal of Petitioners' appeal from the denial of their qualified immunity motion defeats federal law and policy.

II. THE POSSIBILITY OF PERMISSIVE APPEAL UNDER IDAHO APPELLATE RULE 12(a) DOES NOT ADEQUATELY PROTECT THE QUALIFIED IMMUNITY DEFENSE

Respondent also argues that Petitioners' federal right to a qualified immunity defense is adequately protected by Idaho law because Idaho Appellate Rule 12(a) allows permissive appeals from interlocutory orders. Respondent contends that under this rule, a § 1983 defendant with a "proffered qualified immunity defense" that "turns on a question of law has a right to have his or her request for review considered by the Idaho Supreme Court," so presumably the opportunity to ask for permissive appeal adequately protects the underlying federal immunity. Respondent's Br., p. 10.

Obviously, the opportunity to request review by an appellate court is very different indeed from having a request for review granted or having a right of review. Idaho Appellate Rule 12(a) has been construed narrowly by the Idaho Supreme Court. The Idaho Supreme Court has held that it "intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11." *Budell v. Todd*, 105 Idaho 2, 4, 665 P. 2d 701, 703 (1983). In *Mitchell*, the Court found the right of immediate appeal to be necessary to preserve the underlying defense. The Court did not suggest that optional review would be sufficient.

III. DENIAL OF AN IMMEDIATE APPEAL IS OUTCOME-DETERMINATIVE

Respondent further attempts to distinguish *Felder* by arguing that, unlike the notice-of-claim requirement that plaintiff failed to meet in that case, an erroneous denial of qualified immunity that cannot be immediately appealed is not outcome-determinative, but instead only "affects the order in which the issues presented will be resolved." Respondent's Br., p. 13. This Court has unequivocally held that the qualified immunity "entitlement is an *immunity from suit* rather than a mere defense to liability" and, further, that the entitlement "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S., at 526, 105 S. Ct., at 2815. The nature of the right is not to have to stand trial or bear the burdens of discovery, and, as to that right, an erroneous denial of the defense that cannot be immediately reviewed is outcome-determinative: The right is irretrievably lost when the case proceeds to trial. It is not an adequate remedy to learn from an appellate court, after discovery and trial are over, that the trial court erred in its initial determination. Moreover, Petitioners note that unlike *Felder*, where some § 1983 plaintiffs could surely meet Wisconsin's 120-day notice-of-claim requirement, there are no steps a § 1983 defendant can take in Idaho as a matter of right to protect the federal qualified immunity defense following an erroneous trial court ruling. To that extent, Idaho's procedural policy is more outcome-determinative than Wisconsin's.

As importantly, the issue of different outcomes between federal and state forums goes directly to the concern over uniformity. There is a balance in § 1983 litigation. The statute is remedial in purpose, yet it is not meant to be applied in a manner that chills governmental discretion or unduly interferes with the ability of government officials to carry out their duties. The federal immunity defenses play a critical role in this balance. Allowing a state that hears § 1983 litigation to proceed in a manner that effectively extinguishes the federal defense creates different incentives in § 1983 litigation and, ultimately, a different balance between the statute's remedial

goals and the need not to unduly disrupt the effective operation of government. Rather than a speedy resolution of insubstantial claims, if a trial court erroneously rules on the immunity defense and there is no right to immediate appellate review, there will be an incentive to settle those insubstantial claims with a monetary payment to avoid the burdens of litigation. This result undermines the current balance in place, contravenes Congressional intent that common law immunities remain intact, see *Howlett v. Rose*, 496 U.S., at 383, 110 S. Ct., at 2446, and conflicts with this Court's concern that the civil rights laws be given uniform application regardless of whether § 1983 claims are brought in state or federal court within the same state, *Felder*, 487 U.S., at 153, 105 S. Ct., at 2314. The balancing as to the most fundamental issues surrounding § 1983 litigation, including the benefits of the qualified immunity defense, should be the same whether a case is brought in federal or state court, and that cannot be achieved if the federal defenses can be defeated in state court by state law.

IV. IDAHO'S PROCEDURAL POLICY DISCRIMINATES AGAINST A FEDERAL RIGHT, BUT EVEN IF IT DID NOT AND IT WERE NEUTRAL, IT COULD STILL BE PREEMPTED

Respondent also contends that Idaho is not discriminating against a federal right because Idaho Appellate Rule 11 applies alike to state and federal claims. This Court pointed out in *Felder* that Wisconsin's notice-of-claim requirement applied to state and federal claims, but the requirement was nevertheless considered discriminatory as compared to tort claims against non-governmental entities.

Idaho Appellate Rule 11 and the Idaho Supreme Court's application of Rule 11 is discriminatory in a similar sense: Under that rule, interlocutory appeals may be had in areas where the Idaho Supreme Court, in promulgating the rule, has determined a state policy is advanced, but in this federal case, even though a denial of immediate review defeats the federal defense and the underlying federal policy, review cannot be

obtained. The Idaho Supreme Court hears interlocutory appeals for numerous state law claims, including those involving probate, reduction of criminal charges, or suppression of evidence. Rule 11 is not "simply part of 'the vast body of procedural rules, rooted in policies unrelated to the definition of any particular substantive cause of action, that forms no essential part of "the cause of action" as applied to any given [litigant].' " *Felder*, 487 U.S., at 145, 108 S. Ct., at 2310. The right to an interlocutory appeal is explicitly tied to particular categories of substantive law. Immediate appeals are authorized for those categories where the Idaho Supreme Court has determined, in promulgating the rule, that a state policy is advanced by allowing the immediate appeal. The federal defense here and its underlying federal policy cannot be preserved without a right of immediate appeal, and it should be protected by state appellate courts.

Perhaps more importantly, as this Court's precedents in *Dice*, *Brown* and *Garrett* illustrate, a state procedural rule does not have to be discriminatory to, nevertheless, be preempted. Even neutral state procedural rules must be preempted if they undermine federal rights. *See also Howlett v. Rose*, 496 U.S., at 372, 110 S. Ct., at 2441 ("States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law.") The Idaho Supreme Court's position would effectively extinguish the primary benefits of the federal immunity entitlement in those cases where trial courts erroneously deny the defense. This outcome directly conflicts with this Court's requirement in *Felder* that state courts hearing federal claims proceed in a manner that protects the federal rights of the litigants. The rights of § 1983 defendants are not protected if the primary federal law defense can be defeated by state procedural rules.

V. A REQUEST FOR INJUNCTIVE RELIEF DOES NOT AFFECT THE DETERMINATION WHETHER STATE COURTS MUST ALLOW IMMEDIATE APPEAL FROM DENIAL OF QUALIFIED IMMUNITY MOTIONS

Respondent argues that because she is seeking injunctive relief,[4] "petitioners . . . will face discovery and the necessity of testifying at the trial of the equitable claim regardless of whether their qualified immunity defense is sustained prior to trial." Respondent's Br., p. 7. But, just last term, in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996), the Court rejected the possibility of further claims for injunctive relief as a ground to deny appeal from denial of a qualified immunity motion:

> The *Harlow* right to immunity is a right to immunity *from certain claims*, not from litigation in general; when immunity with respect to those claims has been finally denied, appeal must be available, and cannot be foreclosed by the mere addition of other claims to the suit. Making appealability depend upon such a factor, particular to the case at hand, would violate the principle discussed above, that appealability determinations are made for classes of decisions, not individual orders in specific cases. Apart from these objections in principle, the practical effect of respondent's proposal would be intolerable. If the district court rules erroneously, the qualified-immunity right not to be subjected to pretrial proceedings will be eliminated, so long as the plaintiff has alleged (with or without evidence to back it up) violation of one "clearly established" right; and both that and the further right not to be subjected to trial itself will be eliminated, so long

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[4] As noted, Respondent did not have a claim for injunctive relief pending when Petitioners filed their notice of appeal to the Supreme Court of Idaho.

as the complaint seeks injunctive relief (for which no "clearly established" right need be alleged).

___ U.S., at ___, 116 S. Ct., at 841-42. The proposed rule of law that pending claims for injunctive relief cancel appealability of qualified immunity motions has been and should continue to be rejected.

Further, as injunctive relief is commonly sought in § 1983 actions brought in federal court, as well as those brought in state court, a request for injunctive relief in a state court action is not a basis for different treatment of § 1983 appeals in these two court systems. Because injunctive relief can be sought regardless of where the action is brought, a request for such relief in a state court should not create different ground rules in the state versus the federal forum.

VI. PETITIONERS ARE NOT SEEKING TO FEDERALIZE STATE PROCEDURAL LAW

Respondent has also attempted to cast the issue in this case as whether state procedural laws must always "mirror" federal procedural laws when a federal case is brought in state court, arguing that "under petitioners' approach, virtually every aspect of state procedure would be at risk." Respondent's Br., p. 20. This characterization of Petitioners' argument is no more accurate than similar characterizations would have been in *Felder, Dice, Brown* or *Garrett*. Petitioners are aware that the general rule is that "states may apply their own neutral procedural rules to federal claims unless those rules are preempted by federal law," *Howlett v. Rose*, 496 U.S., at 372, 110 S. Ct., at 2441, and Petitioners do not dispute this general rule. Rather, Petitioners are arguing that their case falls into that category of cases where a well-established exception to this general rule applies: State law must yield when it burdens a substantial right of the litigants under federal law.

Further, with the exception of contending that they have a federal qualified immunity defense that can only be protected by a right of immediate appeal, Petitioners have accepted all other civil and appellate procedural rules without

objection and do not contend that the Idaho courts have "an obligation to follow the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, or the procedural provisions of the United States Code." Respondent's Br., p. 13.[5]

However, there is no state procedural rule with which Petitioners can comply to obtain an immediate review as of right of the state trial court's order denying their qualified immunity motion. Without review, if the trial court has erred, Petitioners will have lost their most important federal defense to a § 1983 case. It is this outcome that directly contradicts this Court's mandate that state courts hearing federal cases must proceed in a manner that protects the substantial rights of the litigants under federal law. *Felder v. Casey*, 487 U.S., at 151, 108 S. Ct., at 2314. Idaho's policy does not simply "dig into" the federal immunity entitlement. If the state trial court rules erroneously, the state policy of denying immediate appellate review effectively eliminates the benefits of the federal defense.

VII. SECTION 1983 DEFENDANTS SHOULD NOT BE REQUIRED TO REMOVE THEIR CASES TO FEDERAL COURT TO ENSURE THEIR FEDERAL RIGHTS ARE PROTECTED

Respondent urges that "[r]emoval is the manner in which Congress has chosen to address differences between state and federal courts." Respondent's Br., p. 20. Respondent further suggests that by remaining in state court, Petitioners receive some benefits from state court procedures and, therefore, they

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[5] For example, it is the law of the Ninth Circuit Court of Appeals, the circuit where Idaho is located, that when records of administrative agencies are provided in support of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the motion to dismiss is not converted into a motion for summary judgment. *E.g., Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994). The Idaho District Court converted Petitioners' 12(b)(6) motion into a summary judgment motion when administrative records were introduced, J.A., p. 63, and Petitioners have not and do not claim a federally protected right different from that result.

must also accept any disadvantages. But, this argument was expressly rejected in *Felder,* where this Court stated that "however equitable the bitter-with-the-sweet argument may appear in the abstract, it has no place under our Supremacy Clause analysis." 487 U.S., at 150, 108 S. Ct., at 2313. This principle, applied to the benefit of § 1983 plaintiffs in *Felder*, should also apply to the § 1983 defendants here.

Congress gave the States concurrent jurisdiction over § 1983 litigation. *Felder*, 487 U.S., at 139, 108 S. Ct., at 2307. State court systems, when they open their doors to § 1983 claims, are not free to defeat federal policy or alter the elements of the federal claim or defense. It is no response to assert that a § 1983 defendant who wants his or her federal rights protected can go to federal court. As this Court noted in *Felder,* "States may make litigation of federal rights as congenial as they see fit – not as a quid pro quo for compliance with other, uncongenial rules, but because such congeniality does not stand as an obstacle to the accomplishment of Congress' goals." *Id.*, at 151, 108 S. Ct., at 2313. In *Howlett v. Rose*, 496 U.S., at 383, 110 S. Ct., at 2446, this Court stated that Congress "[took] common-law principles into account in providing certain forms of absolute and qualified immunity" when enacting 42 U.S.C. § 1983. Further, this Court has noted that Congress desired "that the federal civil rights laws be given a uniform application within each state," *Wilson v. Garcia*, 471 U.S. 261, 274-275, 105 S. Ct. 1938, 1946-1947, 85 L. Ed. 2d 254 (1985), and that the "elements of and the defenses to, a federal cause of action are defined by federal law," *Howlett*, 496 U.S., at 375, 110 S. Ct., at 2442. To argue that § 1983 defendants who want the primary benefits of their federal defense preserved must go to federal court ignores each of these principles. Idaho courts are not free to alter the elements of the § 1983 claim; they should not be able to proceed in a manner that eliminates or undermines the primary federal defense as a cost for litigating the federal claim in a state forum.

VIII. REQUIRING IDAHO COURTS TO PROTECT THE QUALIFIED IMMUNITY DEFENSE DOES NOT UNDERMINE FEDERALISM

In a somewhat related argument, Respondent also contends that requiring an immediate appeal disrupts the state's allocation of authority between appellate and trial courts and undermines federalism. Respondent's Br., pp. 12-17, 37-41. It is not apparent why requiring an appeal earlier in a lawsuit rather than later is more invasive of sovereignty than ordering a State to send a factual issue to a jury and not a judge, see *Dice*, holding that a State must open its court doors to hear certain federal claims, see *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 910, 91 L. Ed. 967 (1947), or holding that States cannot apply notice-of-claim or exhaustion of administrative remedy requirements before hearing § 1983 cases in their courts, see *Felder* and *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982).

Idaho has an appellate court system of general jurisdiction comprised of the Idaho Supreme Court and the Idaho Court of Appeals.[6] Idaho's appellate courts have the ability to hear and do hear interlocutory appeals in a number of areas. See Petitioners' Br., pp. 17-18. Idaho has voluntarily opened its court doors to § 1983 litigation. The Idaho courts have the responsibility to proceed in a manner that protects the substantial federal rights of the § 1983 litigants, including the qualified immunity rights of the defendants. Petitioners do not ask this Court to order the Idaho legal system to create

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[6] The Idaho Supreme Court has jurisdiction to hear Petitioners' appeal. Idaho Const., art. V, § 9 gives the Idaho Supreme Court "jurisdiction to review, upon appeal, any decision of the district courts, or of the judges thereof." Indeed, the Idaho Supreme Court has held that this constitutional jurisdiction gives it plenary power to review decisions that are not appealable as a matter of right. "[Art. V, § 9] gives this Court power to review 'any decision' of the district courts even though I.C. § 19-2804 does not give the aggrieved party, in this case the state, a right of appeal to this Court." *State v. Lewis*, 96 Idaho 743, 745, 536 P.2d 738, 740 (1975). The Idaho Court of Appeals also has jurisdiction to be assigned Petitioners' appeal. Idaho Code § 1-2406 (1990).

anything that is not now in place; the machinery to hear their appeal is already there. Petitioners only ask that the existing machinery be used to protect the substantial federal rights at stake.

Petitioners also note that *Felder* rejected a similar federalism argument, concluding that the "very notions of federalism upon which respondents rely dictate that the state's outcome determinative law must give way when a party asserts a federal right in state court." 487 U.S., at 150-51, 108 S. Ct., at 2313. Just as Idaho courts cannot apply state procedures that alter the outcome for a litigant bringing a federal case, they should not be able to apply procedures that alter the outcome for a litigant defending one.

IX. THE INTERESTS AT STAKE INCLUDE THOSE OF THE PETITIONERS SUED IN THEIR INDIVIDUAL CAPACITIES AS WELL AS THOSE OF THE STATE

Respondent urges that the only interests here are those of the State, and "if a state has concluded that these state interests are not sufficient to justify affording state officials an interlocutory appeal, there is no reason to construe federal law to preempt state law." Respondent's Br., p. 37. In a similar vein, Respondent characterizes this case as "present[ing] the somewhat unusual spectacle of a state Attorney General attacking the validity of his own state's Appellate Rules." *Id.*, p. 39.

Certainly, Idaho's interests here are pressing. Idaho has an interest in preserving the effective functioning of government and protecting its officers from the burdens that can be imposed by discovery and trial.[7] However, there are more than just the State's interests at stake here. Petitioners are sued in their individual capacities. Qualified immunity is their personal defense. Indeed, the State is not a person who can be named as a defendant in a § 1983 action, whether that action

[7] In fact, Idaho's requirement of a tort claim filing, which is pre-empted by *Felder*, is an expression of those interests.

is brought in state or federal court. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). Therefore, it would be anomalous to suggest that when the Idaho Attorney General represents these Petitioners, he can or should waive a defense personal to them.[8]

Further, when rights under federal law are undermined by state appellate rules, the injured party does not have a responsibility before seeking review in this Court to try to persuade the state legislature to change the offending state law. Respondent's Br., pp. 39-40. Indeed, in Idaho, where the Idaho Supreme Court promulgates court rules and has held that the rules take precedence over conflicting state statutes, it would take a state constitutional amendment for the political branches to alter the Idaho Appellate Rules. See *In re SRBA Case No. 39576*, 128 Idaho 246, 258-259, 912 P.2d 614, 626-627 (1995) (statute conflicting with rule of civil procedure is invalid); *State v. Zimmerman*, 121 Idaho 971, 974, 829 P.2d 861, 864 (1992) (statute conflicting with rule of evidence must yield to rule of evidence); *State v. Currington*, 108 Idaho 539, 541, 700 P.2d 942, 944 (1985) (statute conflicting with rule of criminal procedure is invalid). Petitioners are not required to seek a political solution before seeking judicial relief. Petitioners' request for review by this Court is perfectly appropriate.

Petitioners also note that it is implicit in Respondent's argument that all three branches of Idaho government must speak with one voice regarding allocation of state resources. But, of course, state executive and legislative officers commonly disagree with judicial officers on legal issues on both the state and federal level. Executive officers frequently bring appeals from judicial decisions to higher courts when higher

[8] The Attorney General represents Petitioners in this case because the Idaho Tort Claims Act obligates the State to provide a defense to any of its employees sued in tort "for money damages arising out of any act or omission within the course and scope of [their] employment," with exceptions for acts or omissions done "with malice or criminal intent," whether "the civil lawsuit is brought . . . under Idaho law or is brought . . . under federal law." Idaho Code § 6-903(b)(i) and -(c).

courts are available, which is the only effective remedy for the parties in the case before the lower court, regardless of whether future cases could be decided differently if the legislature changed the law under which the case was decided. Petitioners are not aware of a doctrine of law that executive officers can challenge a state court appellate decision before this Court on federal grounds, which of course is accepted practice, *e.g.*, *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (Florida Attorney General petitioned court to overturn decision of Florida Supreme Court on federal grounds), but cannot challenge a state court appellate rule or the application of a state court appellate rule before this Court on federal grounds.

X. THIS COURT HAS NEVER HELD THAT A STATE MAY MAKE LITIGATING A FEDERAL CLAIM SO CONGENIAL AS TO ALTER THE FEDERAL CAUSE OF ACTION OR UNDERMINE THE FEDERAL DEFENSE

Finally, Respondent argues that, under § 1983, a state may provide remedies more favorable to federal claimants than would exist in federal court and can apply procedures that burden or restrict the federal defense. There is no precedent from this Court holding that a state court may alter the elements of or defenses to a § 1983 case. In making her argument, Respondent relies primarily on a quote from *Felder*, 487 U.S., at 151, 108 S. Ct., at 2313, to the effect that States may make litigation of federal rights as congenial as they see fit as long as "such congeniality does not stand as an obstacle to the accomplishment of Congress' goals." Respondent's Br., p. 41. However, as already discussed, undermining the primary federal defense to a § 1983 claim would defeat both the Congressional intent to keep the common-law immunity intact and "Congress' desire that the federal civil rights laws be given a uniform application within each state." *Howlett*, 496 U.S., at 383, 110 S. Ct., at 2446; *Felder*, 487 U.S., at 153, 108 S. Ct., at 2314.

State courts cannot provide "congenial" forums that add to or subtract from the federal elements or defenses to a § 1983 case. This Court has stated that "the elements of, and defenses to, a federal cause of action are defined by federal law." *Howlett*, 496 U.S., at 375, 110 S. Ct., at 2447. Thus, a state may not apply a state municipal immunity defense to a § 1983 action. *Howlett*. Likewise, a state tort law principle, such as vicarious local government liability, cannot be imported onto a § 1983 claim, even if the state law principle was designed for the protection of federal civil rights and to benefit the plaintiff. *Moor v. County of Alameda*, 411 U.S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973). A state may not "adulterate" the "dominant characteristic" of a § 1983 action by imposing mandatory settlement periods. *Felder*, 487 U.S., at 148, 108 S. Ct., at 2312. And, a § 1983 plaintiff cannot be made to exhaust state administrative remedies. *Patsy, supra*.

These cases, when viewed as a body, reflect the important objective that the substance of § 1983 litigation be uniform among the federal and state courts. *See also Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985) (all § 1983 litigation to be characterized as personal injury litigation in order that the statute of limitations applied within each state will be the same); *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980) (federal civil rights attorney fees award act applies to a § 1983 action brought in state court as well as in federal court). This Court's precedent consistently holds in many contexts that the substance of § 1983 be applied in the same manner regardless of the forum in which an action is brought. There is nothing in this Court's § 1983 precedent to condone a state court proceeding in a manner that undermines or nullifies the key federal defense or applies defenses under the statute differently than would a federal court or courts of other States. While much of this Court's § 1983 precedent has addressed the rights of § 1983 plaintiffs, *Moor* and *Howlett* are clear that just as a State cannot alter the § 1983 claim itself, it also cannot change the federal defense or expand the federal claim to the detriment of the defendant.

Respondent's position that state courts can be so "congenial" as to burden or nullify the federal defense to a § 1983 action, even though, one presumes, the elements to the § 1983 claim must be protected, displays a striking indifference to the federal rights of defendants in § 1983 litigation. There is an element of unfairness to Respondent's position that should not be overlooked. Section 1983 defendants cannot raise state law defenses in state court. For them, their right to the federal defense is just as important as the ability to bring the case is to § 1983 plaintiffs. A § 1983 defendant who is sued in state court and who is entitled to the federal qualified immunity defense should also be entitled to have that defense protected by the state court so that he or she does not have to unnecessarily bear the burdens of discovery and trial.

Respectfully submitted,

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No. 96-292

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In The

Supreme Court of the United States

October Term, 1996

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF OF THE COMMONWEALTH OF KENTUCKY AND THE STATES OF ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, FLORIDA, GEORGIA, HAWAII, ILLINOIS, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, VERMONT, VIRGIN ISLANDS, WASHINGTON, WEST VIRGINIA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

Hundreds, if not thousands, of § 1983 actions are filed in state and federal courts each year. Some are meritorious while many are frivolous. A state official sued in state court cannot always remove the action to federal court because removal requires unanimity of all defendants. 28 U.S.C. § 1441(a). Consequently, much of § 1983 litigation occurs in a state forum.

Absolute and qualified immunities are critically important to the effective operation of state government. These operate to shield the good faith decisions and reasonable acts of public officers from liability. This helps to insure that the proper exercise of discretion by public officials is not chilled, and that officials are not deflected from attending to the public's business.

In federal courts, there is a well established right to an interlocutory appeal of a pretrial denial of the qualified immunity defense. This Court has repeatedly held that an interlocutory appeal insures the full benefit of this immunity: immunity from discovery and trial. Nonetheless, state courts are presently divided on whether a pretrial denial of qualified immunity is immediately appealable. The majority of state courts properly reason that to prohibit an interlocutory appeal effectively extinguishes the federal immunity. These courts hold that such a result is preempted by federal jurisprudence. Other state courts have held the opposite, concluding that a state procedural rule preventing an interlocutory appeal can be applied.

Amici curiae hold a common view that the substantive protection afforded to state officials by qualified

immunity, i.e., immunity from discovery and suit, should not depend on the procedural rules of the state where suit is brought. The rule instead must be a uniform application of the federal right of interlocutory appeal irrespective of forum.

SUMMARY OF ARGUMENT

This Court held in *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), that § 1983 actions brought in state courts must protect the federal substantive rights of the parties. Qualified immunity is such a substantive right. Under this Court's precedent, qualified immunity cannot be extinguished by a state procedural rule. Nevertheless, while some state appellate courts rightly acknowledge this principle, others, such as the Idaho Supreme Court, refuse. This refusal effectively eliminates the immunity in those cases where the trial court's initial determination is ultimately deemed erroneous.

Qualified immunity is too important to the effective functioning of government to be threatened in this manner. This Court held in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), that when Congress enacted 42 U.S.C. § 1983 it did not intend to abrogate the immunity defenses. This Court recognized that these defenses are imperative to the sound exercise of discretion by public officials and the effective operation of government.

The issue presented by this litigation is neither complex nor novel. Amici simply request that the rule of

interlocutory appeal applicable to § 1983 claims brought in federal courts be extended to those litigated in state courts.

ARGUMENT

I. The Established Jurisprudence of this Court Recognizes a Right To an Interlocutory Appeal.

This Court has recognized many times that Congress did not intend to "abolish wholesale all common-law immunities" when the Civil Rights Act of 1871 was enacted. *See, e.g., Scheuer v. Rhodes*, 416 U.S. at 243, 94 S.Ct. at 1690, 40 L.Ed.2d at 101. Because of common law precedent predating the enactment of the Civil Rights Act, or their constitutional status, some officials have "absolute immunity" from suit.

It is well settled that legislators have absolute immunity in their legislative functions, judges in their judicial functions, and prosecutors in their adversarial functions. *See, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975) (legislative immunity); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872) and *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (judicial immunity); and *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (prosecutorial immunity). Absolute immunity provides protection from suit even for clearly erroneous or malicious behavior. The policy behind this heightened immunity protection is to afford greater protection for officials whose unique functions (legislative, judicial, or prosecutorial) make them more vulnerable to suit, and allow

them to exercise the independence of judgment essential to the proper functioning of these important offices.

Absolute immunity is granted sparingly in a few narrow functional categories. It protects judicial, legislative, and prosecutorial functions regardless of the title of the defendant official who performs these acts. Even so, judges, prosecutors, and legislators do not have absolute immunity for other functions such as administrative or investigative acts.

Because absolute immunity has been sparingly recognized, most officials have a lesser "qualified" immunity from suit. This immunity has evolved from common law origins which often turned on the subjective "bad faith" of the officials.

In *Scheuer v. Rhodes, supra,* and *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), this Court established a qualified immunity test based on common law immunity doctrine that had objective and subjective components. Under the objective part of the test, the official had immunity if he could show the constitutional violation he allegedly committed was not clearly established by prior law. The subjective prong provided for immunity where the official acted in good faith, which almost inevitably was a question for the factfinder at trial.

This subjective test did not protect officials from the burdens of discovery or trial. In *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982), this Court recognized that public policy considerations compelled it to modify this test to provide more protection for public officials.

Harlow recognized that the Civil Rights Act was enacted as an avenue for vindication of important constitutional guarantees. This is the reason most public officers do not have absolute immunity. "At the same time," this Court said, "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the governmental officials, but to society as a whole." *Id.,* 457 U.S. at 814, 102 S.Ct. at 2736, 73 L.Ed.2d at 408. "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is a danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials] in the discharge of their duties.' " *Id.,* 457 U.S. at 814, 102 S.Ct. at 2736, 73 L.Ed.2d at 408 (quoting *Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied,* 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed.2d 1363 (1950)). *See also, Hunter v. Bryant,* 502 U.S. at 229, 112 S.Ct. at 537, 116 L.Ed.2d at 596.

So, the test needed adjustment to protect against these unacceptable costs. This was done in *Harlow.* Here, this Court removed the subjective component of the test, so that "bare allegations of malice should not suffice to subject government officials to either the costs of trial or the burdens of broad-reaching discovery." *Id.,* 457 U.S. at 818, 102 S.Ct. at 2738, 73 L.Ed.2d at 410. This Court held that the federal common-law qualified immunity provides a shield from civil liability "insofar as [an official's] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known." *Id.*, 457 U.S. at 818, 102 S.Ct. at 273, 73 L.Ed.2d at 410.

This rule, and its underlying principles, represents the current state of the law. As this Court recently said, "*Harlow* adopted this criterion of 'objective legal reasonableness,' rather than good faith, precisely in order to 'permit the defeat of insubstantial claims without resort to trial.' " *Behrens v. Pelletier*, 516 U.S. at ___, 116 S.Ct. at 838, 133 L.Ed.2d at 783 (quoting *Harlow*, 457 U.S. at 819, 102 S.Ct. at 2722, 73 L.Ed 2d at 396). This provides protection to all but the plainly incompetent and those that would knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). Thus, this Court has provided public officials with tools that work: summary judgment and Rule 12 motions that can weed out meritless claims.

Unsurprisingly, qualified immunity was subsequently held by this Court to be "an *entitlement* not to stand trial or face the burdens of litigation, conditioned on the resolution of the essentially legal [immunity] question." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411, 425 (1985) (emphasis added). As later clarified by this Court, "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277, 287 (1991). This is the full scope and benefit of an immunity to which an official is entitled.

As a result, this Court established in *Mitchell* that "a district court's denial of a claim of qualified immunity, to

the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Id.*, 472 U.S. at 530, 105 S.Ct. at 2817, 86 L.Ed.2d at 427. This Court properly recognized that this was the only practical way in which the full benefit of the immunity could be realized by an official.

In granting this right of interlocutory appeal, this Court applied the "collateral order" doctrine of *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) to a trial court order denying a qualified immunity defense and authorized an interlocutory appeal. This Court did so in recognition of the reality that qualified immunity is also an immunity from suit, not just from liability, so that the normal rule against interlocutory appeals does not apply. More recently, this Court has restated the *Cohen* doctrine to clarify that interlocutory appeals are justified if the trial court order:

> [1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment.

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 144, 113 S.Ct. 684, 688, 121 L.Ed.2d 605, 613 (1993).

Last term, this Court held that the right of interlocutory appeal was so important it was not limited by the "one interlocutory-appeal" rule. *Behrens v. Pelletier, supra,* held that a trial court's successive denial of qualified immunity may require more than one interlocutory appeal. For example, an official may assert qualified

immunity in a motion to dismiss. The official may file an immediate appeal if that motion is denied. If that decision is affirmed and the parties engage in discovery, the official may argue again for immunity in a motion for summary judgment. If that motion is denied, the official may file another immediate appeal. This result is just because the importance of the qualified immunity's "trial avoiding" purpose outweighs possible delays associated with multiple appeals. *Id.*, 516 U.S. at ___, 116 S.Ct. at 842, 133 L.Ed.2d at 789 (J. Breyer dissenting).

Under the supremacy clause, states have concurrent jurisdiction and a concurrent duty to enforce federal law. *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). From this proposition, three corollaries follow:

> 1. A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.'
>
> 2. An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.
>
> 3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, [this Court] must act with the utmost caution before deciding that [the State Court] is obligated to entertain the claim.

Howlett v. Rose, 496 U.S. 356, 369-372, 110 S.Ct. 2430, 2439-2440, 110 L.Ed.2d 332, 348-350 (1990). This Court has

rarely upheld a state court's refusal to entertain a federal cause of action. *Id.*, 496 U.S. at 374, 110 S.Ct. at 2442, 110 L.Ed.2d at 352.

When state courts exercise their concurrent jurisdiction to enforce a plaintiff's federal rights (thereby accepting the duty to protect a defendant's federal defenses), "[s]tates may establish the rules of procedure governing litigation in their own courts. By the same token, however, where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.' *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296, 70 S.Ct. 105, 106, 94 L.Ed. 100 (1949)." *Felder v. Casey*, 487 U.S. at 138, 108 S.Ct. at 2306, 101 L.Ed.2d at 137.

This Court further explained that "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law.' For 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962)." *Felder v. Casey*, 487 U.S. at 138, 108 S.Ct. at 2307, 101 L.Ed.2d at 138.

Felder struck down Wisconsin's "notice-of-claim" statute, which had been used to bar a plaintiff's § 1983 suit, because the statute conflicted with "both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and *predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court. . . .* " *Id.*, 487 U.S. at 138, 108 S.Ct. at 2307,

101 L.Ed.2d at 140 (emphasis added). This Court has clearly held that "[s]tates may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts." *Id.*, 487 U.S. at 138, 108 S.Ct. at 2308, 101 L.Ed.2d at 138.

This Court applied its reasoning in *Felder* to void a state law that defeated the filing of a § 1983 suit by a plaintiff. This Court's reasoning is equally applicable to a state law governing the filing of interlocutory appeals in § 1983 suits by a defendant state official. A state's procedural rule which conflicts with the superior federal substantive rule must yield, or else the state official's right not to stand trial is simply illusory.

II. Current Status of Interlocutory Appeal in the States.

The majority of states which have addressed the issue of a state official's right to file an interlocutory appeal of a pretrial denial of qualified immunity have concluded that the state appellate courts must either accept interlocutory appeals or provide some other avenue of contesting the pretrial denial.[1] These states recognize the clear primacy of federal law in this area and the principle that the federal rights of the parties in § 1983 litigation cannot be extinguished by state law. *Abell v. Dewey*, 870 P.2d 363 (Wyo. 1994); *Breault v. Chairman of Bd. of Fire Com'rs*, 513 N.E.2d 1277 (Mass. 1987); *Carrillo v. Rostro*, 845 P.2d 130 (N.M. 1992); *City of Lakewood v. Brace*,

[1] Some states have denied the right of interlocutory appeal, but permitted the filing of original actions, i.e., petitions for writ of mandamus or petitions for writ of error.

919 P.2d 231 (Colo. 1996); *Corum v. University of North Carolina*, 389 S.E.2d 596 (N.C.App. 1990); *Henke v. Superior Court*, 775 P.2d 1160 (Ariz.App. 1989); *Lord v. Murphy*, 561 A.2d 1013 (Me. 1989); *McGovern v. City of Minneapolis*, 475 N.W.2d 71 (Minn. 1991); *McLin v. Trimble*, 795 P.2d 1035 (Okla. 1990); *Murray v. White*, 587 A.2d 975 (Vt. 1991); *Richardson v. Chevrefils*, 552 A.2d 89 (N.H. 1988); *Ryan v. City of Augusta*, 622 A.2d 74 (Me. 1993); *State v. Hogg*, 535 A.2d 923 (Md. 1988); *Samuel v. Stevedoring Services of America*, 29 Cal.Rptr.2d 420 (Cal.App. 2 Dist. 1994); *Tucker v. Resha*, 648 So.2d 1187 (Fla. 1994); *Virden v. Roper*, 788 S.W.2d 470 (Ark. 1990).

A few states have allowed appellate review on a *discretionary* case-by-case basis without directly resolving the issue of the right of interlocutory appeal. *Ex Parte Franklin County Dept. of Human Resources*, 674 So.2d 1277 (Ala. 1996); *Lancie v. Giles*, 572 A.2d 827 (Pa.Cmwlth. 1990); *Walden v. City of Seattle*, 892 P.2d 745 (Wash.App. Div. 1 1995).

A small minority of states, which Idaho has recently joined, do not permit interlocutory appeals. These states hold that a § 1983 defendant takes the state court's procedural rules "as is" – even if those rules defeat the substantive federal right of qualified immunity. *Civil Service Emp. Ass'n v. Moritz*, 529 N.E.2d 1290 (Ohio App. 1987); *Klindtworth v. Burkett*, 477 N.W.2d 176 (N.D. 1991); *Noyla v. Flores*, 740 S.W.2d 493 (Tex.App. – Corpus Christi 1987); *Pizzato's, Inc. v. City of Berwyn*, 523 N.E.2d 51 (Ill.App. 1 Dist. 1988); *Turner v. Giles*, 450 S.E.2d 421 (Ga. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995).

The remaining states, including the lead amicus Kentucky, have yet to address the issue. The proper resolution is to acknowledge that the majority view is correct under this Court's jurisprudence.

III. The Right of Interlocutory Appeal Preserves a Substantive Federal Right and Prevails Over State Procedural Rules

Resolution of whether a trial court's pretrial denial of qualified immunity is subject to appeal requires the determination of whether the right of interlocutory appeal is merely a federal procedural rule or an important federal substantive right intended to preserve the immunity from suit. This Court answered this question in *Mitchell* where it described the right as an "entitlement." This Court equated the right of interlocutory appeal in this context to a defendant's claim of right not to stand trial on double jeopardy grounds. This is because a defendant will be irreparably harmed even if found not guilty at a second criminal trial. *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). *Abney* speaks of a federal right to "not stand trial" if a trial should *legally* not occur. Consequently, this Court's jurisprudence provides that an interlocutory appeal is the *only* way to give full protection to this constitutional right "not to face trial at all." *Id.*, 431 U.S. at 662, n.7, 97 S.Ct. at 2041, 52 L.Ed.2d at 662.

This Court has also emphasized the importance of resolving the qualified immunity issue at the earliest possible stage of litigation so as to shield state officials from the disruptive effects of modern litigation. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523

(1987). The *Mitchell* rule, which initially established the right of interlocutory appeal, was arguably an interpretation of the federal court's final judgment rule and collateral order doctrine. Subsequent case law has clarified that the right of interlocutory appeal is an integral aspect of qualified immunity and states must accept this the same as they must accept the federal definition of qualified immunity.

The importance of the federal qualified immunity defense to state officials sued pursuant to 42 U.S.C. § 1983 is heightened by the unavailability of state immunity defenses. *Martinez v. State of Cal.*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988). Therefore, only the immunities derived from federal common law can be employed. *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). The scope of the common law federal right of qualified immunity in a state court proceeding is the same as that found in federal court. In short, the application of immunity is governed by federal law. *Martinez v. State of Cal.*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). It is well settled that state immunity law is preempted in a § 1983 action irrespective of forum. *Felder v. Casey*, 487 U.S. at 138, 108 S.Ct. at 2306, 101 L.Ed.2d at 137.

The federally recognized entitlement to qualified immunity, i.e., the right "not to stand trial," is forever lost if an erroneous pretrial adjudication of that entitlement goes to trial. "States may not apply such an outcome-determinative law when entertaining substantive rights in their courts." *Felder v. Casey*, 487 U.S. at 140, 108 S.Ct. at 2308, 101 L.Ed.2d at 139.

The outcome in a federal § 1983 suit – whether a state official is erroneously required to stand trial and thereby denied a substantive federal right – should not be determined by the forum where suit is brought. State courts have a constitutional duty to recognize and enforce a state official's substantive right of interlocutory review of a decision denying a claim of qualified immunity.

IV. Public Policy Demands That an Interlocutory Appeal Lie in Actions Brought in State Court the Same as in Federal Court.

The most obvious public policy basis supporting the right to an interlocutory appeal is that it is fundamentally unfair and a violation of equal protection to have an arbitarily drawn dual standard. This is particularly true where, as here, there is absolutely no rational basis for making a distinction. This Court used the same liability and immunity tests previously applied to actions against state and local officials brought under § 1983 to constitutional actions brought against federal employees. In doing so, this Court said it would be "untenable" to have different standards of liability or immunity merely because the defendants worked for different governments. *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Likewise, the existence of differing appealability standards between federal and some state courts undermines the policy reasons for qualified immunity. This is untenable.

This Court has observed that it has "never held that state courts *must* entertain § 1983 suits." *National Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. ___,

n.4, 115 S.Ct. 2351, 2355, n.4, 132 L.Ed.2d 509, 516, n.4 (1995). However, "whether the state courts are obliged to hear § 1983 claims is largely of academic interest, 'because virtually all states have explicitly asserted jurisdiction over § 1983 claims, and no state categorically bars § 1983 actions from its courts.' " Schwartz & Kirklin, *Section 1983 Litigation, Claims Defenses & Fees*, Vol 1, p. 46 (1991), quoting S. Steinglass, *Section 1983 Litigation in State Courts* § 9.1, at 9-1 (1988). Although most § 1983 actions are filed in the federal courts, they are increasingly being filed in state courts. Thus, the need for uniformity. *See*, S. Steinglass, *Section 1983 Litigation in State Courts* at 1-1, & 2.1, at 2-1.

Because of the current lack of uniformity, the principles underlying qualified immunity are not well served. This is particularly true where state trial judges do not have the same level of experience with § 1983 claims as their federal counterparts. Thus, the need for an interlocutory appeal is even *greater* in a state court, because of the increased likelihood of judicial error in denying a claim of immunity predicated upon *federal* common law.

A defendant cannot always choose the forum in which the action will be litigated. It is not unreasonable to assume many plaintiffs prefer filing § 1983 claims in state court knowing that defendants enjoy *greater* immunity in federal court with the existence of an interlocutory appeal right. A public official ought not be forced to surrender even an iota of his immunity simply because removal is not possible.

The important public policy interests underlying this interlocutory appeal doctrine established by *Harlow* and

Mitchell are well known. These policies are all undermined when state courts refuse to allow immediate appeals when immunity is denied.

Some of the societal costs are plain. Public officials are distracted from their duties when they face the usual burdens of litigation. Federal, state, and local governments expend millions of dollars defending all too frequent frivolous suits by prisoners and others. *See*, Schuck, *Suing our servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S.Ct. Rev. 281, 283, n.2. These costs are minimized where interlocutory appeals are available.

The need for officials to engage in fearless decision making is an even more compelling policy basis, but not always as obvious. Government officials are more likely to govern fairly, reasonably, and properly if they are free from the threat of baseless and harassing litigation. This is true for all branches of government. Judges need to be free of the fear that dissatisfied litigants will seek revenge for their decisions claiming bias or corruption. Legislators should be free to vote their convictions without threat of suit by political opponents or those who dislike being subject to the particular statute or regulation. Members of the executive branch who develop or implement policy should be free to serve the public interest.

Lower level executive officials, especially, face daily choices between taking actions that expose them to a high risk of being sued if the public interest is pursued, or looking the other way so as to avoid or minimize a personal risk. *See generally*, Schuck, at 295-316. Society as

a whole suffers when public officials sacrifice the public interest to minimize their personal risk.

These are policy concerns which this Court has recognized justify the existence of official immunity. These policy concerns justify interlocutory appeal in federal court. These policy concerns also justify this Court to *now* hold that a state procedural rule must not threaten the essential qualified immunity protection of public employees by recognizing the right of interlocutory appeal in all § 1983 actions – irrespective of forum.

CONCLUSION

When Congress enacted 42 U.S.C. § 1983, it did not intend to abrogate the immunity defenses. Qualified immunity is a critical defense not only to individual § 1983 defendants sued in state court, but also to state and local government generally. The immunity, by protecting the reasonable decisions and acts of public officials, protects the effective operation of government. This is a valid public purpose worthy of this Court's protection. State government simply cannot afford to have this defense extinguished. The immunity should not be defeated because of the forum in which the claim is litigated. Yet, this is the result which state procedural rules that prohibit an immediate appeal accomplish. This Court

is respectfully requested to hold that the principles articulated in *Felder v. Casey, supra,* apply to § 1983 defendants, not merely to § 1983 plaintiffs.

Respectfully submitted,

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